

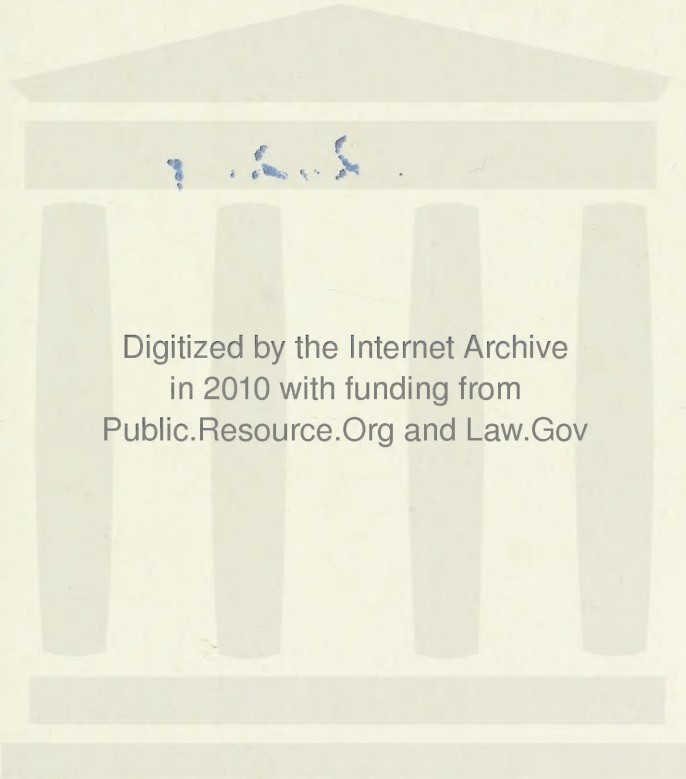
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2417

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. E. SPAULDING, L. B. MANLOVE and P. M.
MANLOVE, co-partners doing business under
the firm name and style of Manlove & Spauld-
ing Mfg. Co.,

Appellants,

vs.

DOUGLAS AIRCRAFT COMPANY, INC., a
corporation, and UNITED STATES OF
AMERICA,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

OCT 26 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

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Assistant Attorney General

CHARLES H. CARR,

United States Attorney

RONALD WALKER and

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600 U. S. Post Office & Court House Bldg.

Los Angeles 12, Calif. [1*]

District Court of the United States for the Southern District of California Central Division

Civil Action No. 3806-BH

R. E. SPAULDING, L. B. MANLOVE and P. M. MANLOVE, co-partners doing business under the firm name and style of Manlove & Spaulding Mfg. Co.,

Plaintiffs,

vs.

DOUGLAS AIRCRAFT COMPANY, INC., a corporation,

Defendant.

COMPLAINT FOR DECLARATORY JUDGMENT AND MONEY JUDGMENT

Plaintiffs complain of defendants and for cause of action allege:

I.

That at all times herein mentioned R. E. Spaulding, L. B. Manlove and P. M. Manlove were and are now co-partners doing business under the firm [2] name and style of Manlove & Spaulding Mfg. Co.; that at all times herein mentioned each of said plaintiffs was and now is a citizen of the State of California, and a resident and inhabitant of the County of Los Angeles, State of California, within the Central Division of the District Court of the United States for the Southern District of California; that at all times herein mentioned the business of said plaintiff was and now is being operated

and conducted in said City of Los Angeles, State of California.

II.

That at all times herein mentioned defendant above named was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware; that at all times herein mentioned said defendant corporation was and now is doing business in the State of California, and within the Central Division of the United States District Court for the Southern District of California.

III.

That the value of the rights which plaintiffs in this suit seek to protect and the value of the property and property rights and the extent of injury involved herein exceed the sum of \$3000.00, exclusive of costs and interest, and are, to-wit: the sum of \$31,048.33.

IV.

That from the 1st day of March, 1944, to and including the 31st day of July, 1944, at said City of Los Angeles, State of California, and within the jurisdiction of the above entitled court, defendant corporation became indebted to plaintiff in the sum of \$31,048.33 for goods, wares and merchandise manufactured and made by plaintiff and sold and delivered to defendant corporation at the special instance, order and request of defendant corporation and at the agreed price of \$31,048.33; that no part of said sum of \$31,048.33 has been paid by defendant corporation to plaintiffs and defend-

ant corporation refuses to pay said sum or any part thereof to plaintiffs solely for the reasons hereinafter set forth.

V.

That an actual controversy exists between plaintiffs and defendant corporation relating to the rights and legal relations of the parties to this action and pertaining to the payment by defendant corporation to plaintiffs of said sum of \$31,048.33; that the facts and circumstances giving rise to and constituting such controversy are as follows, to-wit:

(a) That at all times herein mentioned Henry L. Stimson was and now is the duly appointed, qualified and acting Secretary of War of the United States; that at all times herein mentioned the said Henry L. Stimson has assumed and pretended and does now assume and pretend to be charged, as said Secretary of War, with the duty of administering section 403 of the [3] Sixth Supplemental National Defense Appropriation Act of 1942 (56 Stat. 245), approved April 28, 1942, as amended by section 801 of the Revenue Act of 1942 (56 Stat. 982), approved October 21, 1942, as further amended by section 1 of the Military Appropriation Act of 1944 (57 Stat. 348) and as further amended by the Act of July 14, 1943 (57 Stat. 564, 565) and the Revenue Act of 1943, said statutes and amendments thereto being hereafter referred to as the "Renegotiation Act".

(b) That at all times herein mentioned Robert P. Patterson was and now is the duly appointed, qualified and acting Under Secretary of War of

the United States; that at all times herein mentioned said Robert P. Patterson has assumed and pretended and does now assume and pretend to be charged with the duty of administering said Renegotiation Act, as said Under Secretary of War, by virtue of the direction of the said Secretary of War; that with respect to the matters herein complained of said Robert P. Patterson, as said Under Secretary of War, has at all times purported to act by virtue of authority delegated to him by defendant Henry L. Stimson, as said Secretary of War, and has assumed to act for and represent the said Secretary of War, the Secretary of the Navy of the United States, the Secretary of the Treasury of the United States, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration, and the respective boards of directors of the Defense Plant Corporation, Metal Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, under the provisions of said Renegotiation Act.

(c) That at all times mentioned herein plaintiffs were and are now engaged in the manufacture, production and sale of mechanical fittings and parts and of airplane parts, all of which are manufactured and produced in the City of Los Angeles, County of Los Angeles, State of California, and are sold by plaintiffs to various persons, firms and corporations throughout the United States ordering said parts and materials from the plaintiffs; that all of the business done by plaintiffs in the manu-

facturing, production and sale of said parts and articles during the fiscal year ending December 31, 1942, was with private firms, corporations and individuals and not with the United States of America; that all of said business constitutes the basis on which the order of February 2, 1944, as hereinafter set forth, was made and entered.

(d) That on February 2, 1944, the defendant Robert P. Patterson purporting to act as said Under Secretary of War, and purporting to act by virtue of the authority delegated to him by the defendant Henry L. Stimson, as Secretary of War, and purporting to act under said Renegotiation Act did make a unilateral order and determination purporting to determine excess profits made by plaintiffs during said fiscal year ending December 31, 1942, which said order was and is in the words and figures following, to wit: [4]

“War Department
Office of the Under Secretary
Washington

“DETERMINATION OF EXCESSIVE
PROFITS

Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

“Whereas, Manlove and Spaulding Manufacturing Company, a partnership (hereinafter referred to as the Contractor), holds contracts and subcon-

tracts subject to renegotiation pursuant to the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended (hereinafter referred to as the Act); and

“Whereas, renegotiation has taken place between the Under Secretary of War and the Contractor, pursuant to the provisions of the Act, for the purpose of eliminating excessive profits realized by the Contractor during its fiscal year ended 31 December 1942, under said contracts and subcontracts; and

“Whereas, as a basis for said renegotiation the Under Secretary of War considered certain financial, operating and other data, submitted by the Contractor or obtained by the Under Secretary of War from governmental or other reliable sources, relating to the profits realized by the Contractor during said fiscal year under said contracts and subcontracts; and

“Whereas, the Contractor has been granted full opportunity to submit such additional information and to present such contentions as the Contractor deemed material in determining the excessiveness of said profits and the renegotiability of such contracts and subcontracts, at hearings of which due notice was given, and due consideration has been given to the financial, operating and other data and information so furnished or obtained and each of the contentions so presented;

“Now, Therefore, pursuant to the authority and discretion vested in the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the

Administrator of the War Shipping Administration, and the respective Boards of Directors of the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company under the provisions of the Act, and duly delegated to the Under Secretary of War under subsection (f) thereof, it is hereby found and determined:

“That \$110,000 of the profits realized by the Contractor during its fiscal year ended 31 December 1942, under its contracts and subcontracts subject to renegotiation pursuant to the provisions of the Act, are excessive.

“That in connection with the payment or discharge by any means of the amount of excessive profits determined hereby to have been realized by the Contractor, the Contractor shall be credited with any [5] amount to which it may be entitled under Section 3806 of the Internal Revenue Code as computed by the Commissioner of Internal Revenue.

“That the Contractor is directed to repay such excessive profits less such tax credit, if any, to the Treasurer of the United States.

“That the excessive profits so found and determined shall be eliminated by any of the methods provided in the Act or any combination thereof; and the Commanding General, Army Service Forces, and the Commanding General, Army Air Forces, are hereby authorized and directed to take

any and all action which may be necessary or desirable to effect such elimination.

2 February 1944

ROBERT P. PATTERSON

Under Secretary of War"

(e) That on May 1, 1944, the said Robert P. Patterson, purporting to act as said Under-Secretary of War, and pretending and purporting to act under and by virtue of the provisions of said Renegotiation Act, did make an order, directed to defendant corporation above named and did cause said order to be served on said defendant corporation, which said order was and is in the words and figures following, to wit:

"War Department
Office of the Under Secretary
Washington, D. C.

1 May 1944

SPRAR

Douglas Aircraft Company
3000 Ocean Park Boulevard
Santa Monica, California

Re: Direction to withhold from Manlove
& Spaulding Manufacturing Company
of Los Angeles, California, pursuant
to the Renegotiation Act.

Gentlemen:

Pursuant to the authority vested in the Secretary of War under Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942,

as amended and duly delegated to me, I found and determined on 2 February 1944 that certain of the prices and profits realized by Manlove & Spaulding Manufacturing Company during its fiscal year ended 31 December 1942 under contracts and sub-contracts subject to renegotiation, were excessive.

In accordance with the authority and duty to eliminate said excessive profits, I hereby direct you to withhold for the account of the [6] United States any and all amounts (not in excess of \$110,000 in the aggregate) otherwise due or which shall become due from you to said Manlove and Spaulding Manufacturing Company.

This direction shall be effective immediately and shall continue in effect until further notice from me.

You are also directed to report in writing to the Chairman of the War Department Price Adjustment Board, Room 3D 573, the Pentagon, Washington, D. C., any amounts which you may, from time to time, withhold for the account of the United States pursuant hereto.

Very truly yours,

(s) ROBERT P. PATTERSON

Under Secretary of War"

(f) That said orders of February 2, 1944, and of May 1, 1944, are and each of them is void; that neither said Secretary of War nor said Under Secretary of War had the power or authority to make said orders and are without power or authority to enforce said orders according to their

terms or otherwise or at all for the reason that said Renegotiation Act is void, without lawful effect and repugnant to the Constitution of the United States in each of the following particulars, to wit:

(1) Said Renegotiation Act is repugnant to Article I, section 1, and Article II, section 8, paragraph 18 of the Constitution of the United States in that it unlawfully delegates legislative power to the defendants and to the secretaries of the various departments as in said Act set forth;

(2) That said Renegotiation Act is repugnant to the Fifth Amendment to the Constitution of the United States in that it deprives plaintiffs of their property without due process of law;

(3) That said Renegotiation Act is repugnant to the Fifth Amendment to the Constitution of the United States in that it takes plaintiffs' property for public use without just or any compensation;

(4) That said Renegotiation Act is repugnant to the Tenth Amendment to the Constitution of the United States in that it attempts to exercise a power not delegated to the United States;

(5) That said Renegotiation Act is repugnant to Article I, section 1, and Article I, section 8, paragraph 18, of the Constitution of the United States and to the Fifth and Tenth Amendments thereto, in that by said Act it is provided that "whenever, in the opinion of the secretary of a department (including the Secretary of War) the profits realized or likely to be realized from any contract with said department or from any subcontract thereunder, whether or not made by the

contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price", and that upon said renegotiation "the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract" and neither said Renegotiation Act nor any other provision [7] of law sets forth or declares any rules, standard, guide or policy by which said Secretary is to be guided in the administration of said Act or in the determination of what are or are not excessive profits other than the arbitrary order, whim or caprice of said Secretary; that by said Act Congress has attempted to delegate to the Secretary the power to refix contract prices and has directed, authorized and empowered him, by unguided opinion and without setting forth any standard, gauge or rule, to determine what profits are excessive;

(6) That said Renegotiation Act further violates said foregoing provisions of the Constitution and the Fifth and Tenth Amendments thereto in that it purports to vest in the Secretary the power to renegotiate contracts made and entered into between private persons, firms and corporations and to which contracts the government of the United States is not a party, and in instances where no privity of contract exists between the contractor or subcontractor and the United States;

(7) That said Renegotiation Act is further repugnant to said Articles of the Constitution of the United States and to said Fifth and Tenth Amend-

ments thereto, in that it provides that upon any negotiation conducted and made and upon any order entered pursuant thereto by the Secretary, said Secretary may make a revision of said contracts renegotiated by reducing the contract price of said contract, but said Renegotiation Act contains no provision whereby the contractor can have his contract price raised in the event that such contract price did not produce a fair profit on the business done under said contract or any profit at all;

(8) That said Renegotiation Act is further repugnant to said Articles of the Constitution and to said Fifth and Tenth Amendments thereto in that it does not provide for any equality of treatment as to all persons, firms or corporations whose contracts are made subject to the provisions of said Act, in the following particulars, to wit:

(a) That by the provisions of said Act the Secretary is authorized, in his discretion, to exempt from some or all of the provisions of said Act "any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established * * * when the period of performance under said contract or subcontract will not be in excess of thirty days";

(b) That by the provisions of said Act the Secretary may exempt from the provisions of said Act a portion of any contract or subcontract during a specified period or periods if in the opinion of

the Secretary. the provisions of the contract are otherwise adequate to prevent excessive profits;

(c) That by the provisions of said Act the Secretary is authorized to exempt contracts and subcontracts, both individually and by general classes and types, from the operation of said Act;

(d) That said Renegotiation Act is made to apply only to contracts [8] involving amounts in excess of \$100,000.00 and does not apply to contracts involving amounts less than \$100,000.00;

(9) That said Renegotiation Act is further violative of said Articles of the Constitution and Amendments in that it directs the Secretary in determining excess profits under any contract not to make allowances for any salaries, bonuses or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount and not to make allowance for any excess reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable; that said Act does not contain any standard, guide or rule for the determination of what are reasonable salaries, bonuses or compensation or for the determination of what are or are not excessive or unreasonable costs or reserves;

(10) That said Renegotiation Act further violates said Articles of the Constitution and Amendments thereto in that it authorized the Secretary, without any rule or standard to guide his discretion, to exempt from renegotiation contracts or portions of contracts made or to be performed during a specified period or periods of time, said

period or periods of time to be fixed by the arbitrary action of the Secretary;

(11) That in exercising the purported power to determine excess profits the Renegotiation Act does not contain any limitation upon or description of the character of the material or data which the Secretary may consider;

(12) That said Renegotiation Act is further violative of said Articles of the Constitution and Amendments thereto in that it contains no provisions for giving to the person whose contract is sought to be renegotiated a hearing or notice of place and time of hearing of such renegotiation; that said Renegotiation Act does not contain any provision for the reception of evidence or of giving to the contractor the right to cross-examine witnesses; that said Renegotiation Act does not contain any provision requiring the Secretary to set forth in any manner the facts or figures forming the basis of any decision determining the existence of any excess profits;

(13) That at the time of the making of said order of February 2, 1944, said Renegotiation Act did not contain any provision allowing a review in any court of the United States of any unilateral arbitrary or other decision made by a Secretary determining the existence of excess profits;

(14) That said Renegotiation Act is further repugnant to said Article of the Constitution and Amendments thereto in that it permits each contract sought to be renegotiated by the Secretary under the provisions of said Act to be construed

in a manner different from that of any other contract in the computation of what constitutes an excess profit and permits the use of a different standard or guide in the determination of what constitutes excess profits even when dealing with contracts of exactly the same class, covering the same materials and operating during the same period of time. [9]

(g) That at all times herein mentioned, plaintiffs have made available to the United States and to its branches, agencies and commissions, charged with the administration of said Renegotiation Act, all of their books, papers, records, documents and accounts relative to their business done during the fiscal year ending December 31, 1942, that at all times plaintiffs have denied that the Government or the Secretary of War acting on behalf of the Government, had any right, power or authority to renegotiate any contracts made by plaintiffs with their customers and have never agreed with the Government, or with any Secretary or with any officer or agent of the Government, or with defendant corporation, to the renegotiation of any of its said contracts; that plaintiffs are advised and believe and therefore allege that the profits realized by them during the fiscal year ending December 31, 1942, were and are not excessive.

(h) That defendant corporation maintains and contends that by virtue of the order made by said Under Secretary of War on May 1, 1944, it is without right, power or authority to pay to plaintiffs said sum of \$31,048.33, or any part thereof,

and that under said order it has no alternative save and except to withhold and on demand to pay said sum and the whole thereof to the United States. On the other hand, plaintiffs maintain and contend that, for the reasons hereinabove stated, said order of May 1, 1944, is null and void and of no force or effect, that said Renegotiation Act is in violation of the Constitution of the United States and of the Fifth and Tenth Amendments thereto as hereinabove set forth and that plaintiffs are entitled to the immediate payment of said sum from defendant corporation.

Wherefore, plaintiffs pray for the following relief and judgment, to wit:

1. That this court, pursuant to the provisions of the Federal Declaratory Judgment Act, declare and decree that said Renegotiation Act is unconstitutional, null and void; that the purported order and direction so made by said Under Secretary of War on May 1, 1944, is null and void and was and is beyond the power, authority and jurisdiction of said Under Secretary of War to make, and neither creates nor imposes any duty on defendant corporation to do the things as in said order specified; that the order purporting to determine excess profits so made on February 2, 1944, was and is null and void.

2. That plaintiffs have judgment against defendant corporation for the sum of \$31,048.33, together with interest thereon from the 31st day of July, 1944, and that defendant be directed to pay said sum to plaintiffs and be directed not to with-

hold said sum or any part thereof for the account of the United States or to pay said sum or any part thereof to the United States. [10]

3. For such other and further relief as may be meet and just in the premises.

4. For costs of suit herein expended.

JOS. I. McMULLEN,

LEO R. FRIEDMAN,

Attorneys for Plaintiffs.

State of California,

County of Los Angeles—ss.

R. E. Spaulding, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated upon information and belief and as to such matters he believes it to be true.

R. E. SPAULDING

Subscribed and sworn to before me this 11th day of August, 1944.

[Seal]

MAX C. HODOR

Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires May 28, 1946.

[Endorsed]: Filed Aug. 11, 1944.

[Title of District Court and Cause.]

CERTIFICATE

To the Honorable Francis Biddle, the Attorney General:

The undersigned, Ben Harrison, Judge of the United States District Court for the Southern District of California, pursuant to Title 28, Section 401 of the United States Code, does hereby certify:

I.

That on August 11, 1944 a complaint for declaratory judgment and money judgment in the above entitled action, was filed in the United States District Court for the Southern District of California, Central Division.

II.

Said action draws in question the constitutionality of an Act of Congress affecting the public interest, to-wit: the Sixth Supplemental National Defense Appropriation Act of 1942 (56 Stat. 245), approved April 28, 1942, as amended by section 801 of the Revenue Act of 1942 (56 Stat. 982), approved October 21, 1942, as further amended by section 1 of the Military Appropriation Act of 1944 (57 Stat. 348) and as further amended by the Act of July 14, 1943 (57 Stat. 564, 565) and the Revenue Act of 1943, known as the Renegotiation Act.

III.

As neither the United States nor any agency thereof, nor any officer nor employee thereof, as such officer or employee, is named as a party there-

to, I hereby certify these facts in conformity with the provisions of said Section 401, Title 28, United States Code.

IV.

Authority is hereby granted to the United States to intervene in the above entitled proceeding and become a party thereto for presentation of evidence and argument upon the question of the constitutionality of said Act.

Done in open court this 12 day of September, 1944.

BEN HARRISON

United States District Judge

[Endorsed]: Filed Sept. 12, 1944.

[Title of District Court and Cause.]

ANSWER

Answer of Douglas Aircraft Company, Inc., a corporation, defendant, to the complaint herein:

For answer to the complaint of the plaintiffs in the above-entitled cause, Douglas Aircraft Company, Inc., a corporation, defendant above named says:

First Defense

I.

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

II.

The Court lacks jurisdiction to try in this suit any issue as to which the Tax Court has jurisdiction pursuant to Section 701 of the Revenue Act of 1943 (Public 235, 78th Congress). That section provides *REW:ds

that any contractor aggrieved by a determination of the amount of his excessive profits may file a petition with the Tax Court of the United States for a redetermination thereof. The Tax Court is given "exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." The proceeding before the Tax Court is a proceeding de novo. Defendant is informed and believes and therefore alleges that plaintiffs have not filed a petition in the Tax Court for redetermination of their excessive profits and that their time for filing such a petition has expired. Plaintiffs cannot, therefore, litigate in this Court any issue which relates to the amount, if any, of plaintiffs' excessive profits.

Third Defense

III.

The plaintiffs are not entitled to the relief sought for the reason that the Renegotiation Act is constitutional and valid and the action taken pursuant thereto was in all respects lawful.

Fourth Defense

IV.

Answering the first paragraph of the complaint, defendant admits the allegations therein contained.

V.

Answering the second paragraph of the complaint, defendant admits the allegations therein contained.

VI.

Answering the third paragraph of the complaint, defendant admits that the value of the property and property rights involved herein exceeds the sum of \$3,000.00, exclusive of costs and interests; but defendant alleges that such value is not more than \$27,580.80.

VII.

Answering the fourth paragraph of the complaint, defendant denies that it became indebted to the plaintiff in the sum of \$31,048.33 in the manner alleged in said paragraph IV, but avers that the amount of the alleged indebtedness is \$27,580.80; and defendant states that it is informed and believes and therefore alleges that by reason of the orders and determinations made by Robert P. Patterson and described in the complaint, said sum of \$27,580.80 is not owing to plaintiffs.

VIII.

Answering the fifth paragraph of the complaint, defendant admits that an actual controversy exists between plaintiffs and defendant relating to the rights and legal relationships of the parties to this

action and pertaining to the payment by defendant to plaintiffs of the amount of the alleged indebtedness; and admits the allegations in paragraph V(a), V(b), V(d) and V(e) contained. With respect to the allegations in paragraph V(c), defendant admits that plaintiffs were and are engaged in the manufacture, production, and sale of mechanical fittings, and of airplane parts, manufactured and produced in the City of Los Angeles, County of Los Angeles, State of California, but defendant denies that all of plaintiffs' business for the fiscal year ending December 31, 1942, was the basis on which the order of February 2, 1944, was made. With respect to the remaining allegations of paragraph V(c), defendant alleges that it is without information or knowledge sufficient to form a belief as to the truth thereof. Defendant denies the allegations contained in paragraph V(f). With respect to the allegations in paragraph V(g), defendant alleges that it is without information or knowledge sufficient to form a belief as to the truth thereof, except that defendant alleges that on or about September 14, 1942, defendant prepared and sent to plaintiffs a letter dated September 14, 1942, a true copy of which is attached hereto as Exhibit A and plaintiffs on November 14, 1942, replied by a letter dated that day, a true copy of which is attached hereto as Exhibit B.

IX.

Defendant denies each and every allegation of the complaint not herein admitted, controverted or specifically denied.

Fifth Defense

X.

Defendant is informed and believes and therefore alleges:

(a) Under the circumstances created by the war, the enactment by Congress of the Renegotiation Act was required to protect the public welfare and to bring the war to a successful and speedy conclusion at a minimum cost to the nation in life and property.

(b) With respect to the matters here in controversy, all action taken by Henry L. Stimson and Robert P. Patterson, and by all persons acting for them or under their direction or on their behalf, was taken pursuant to and was authorized or required by the Renegotiation Act.

Wherefore, defendant denies that plaintiffs are entitled to the relief, or any part thereof, in the said complaint demanded or any relief whatever, and prays to be hence dismissed with its reasonable charges in this behalf sustained.

CHARLES H. CARR ,

United States Attorney

RONALD WALKER

Assistant United States
Attorney

ROBERT E. WRIGHT,

Assistant United States
Attorney

EXHIBIT "A"

(Copy)

Douglas Aircraft Company, Inc.
Santa Monica, California

September 14, 1942

Cable Address "Douglasair"

In reply refer to File G305NM

Mailing Address: Materiel Division, P. O. Box
9337, Station S. Los Angeles, California.

To All Vendors:

Subject: Renegotiation Clause

Gentlemen:

You are probably familiar with Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public Law 528, 77th Congress, approved April 28, 1942). This is the statute prescribing renegotiation for government contracts and subcontracts thereunder.

Section 403 requires us to insert a renegotiation clause in each subcontract involving more than \$100,000, and the provisions of some of our more recent contracts define "subcontract" as including practically everything we buy. Furthermore, we suspect that we should insert it in each purchase order, since the total orders to any firm under a given contract may aggregate more than \$100,000. Therefore, we believe that, for safety's sake, we should insert a clause in every purchase order. It is much simpler to do this by means of a blanket agreement than by attaching the clause to each

order. Hence we are enclosing two copies of such a blanket agreement, with the request that you execute one and return it to us.

As we construe Section 403, the statute is applicable to all orders, though the clause need be inserted only when more than \$100,000 is involved. Therefore we are not altering your rights or liabilities by this blanket agreement, which is only a declaration of your present position. Your execution of it is thus only a formality, but it is a formality which the Government seems to desire and which we are trying to make as painless as possible.

Yours sincerely,

DOUGLAS AIRCRAFT
COMPANY, Inc.

(signed) D. J. BOSIO

Chief of Materiel Division

NM:lm

Enc.

First Around the World

EXHIBIT "B"

(Copy)

(Face of Exhibit "B")

November 14, 1942

Douglas Aircraft Company, Inc.

Materiel Division

P. O. Box 9337, Station S.

Los Angeles, California

Subject: Renegotiation Clause

Gentlemen:

We have received your letter of September 14, 1942, on the subject of renegotiation.

We hereby agree that Special Conditions 42 and 42A printed on the reverse side hereof shall be applicable to all purchase orders which you issue to us under Army and Navy contracts respectively; provided, however, that this agreement shall cover only purchase orders in which you are required by law or by contract to insert such Special Conditions, and shall continue only so long as such requirement may be effective.

Yours sincerely,

MANLOVE & SPAULDING
MFG. CO

(signed) By R. E. SPAULDING

Partner

Note: Execution should be by an authorized officer or a general partner.

In Purch. Nov. 16, '42 AM

(Reverse Side of Exhibit "B")

Special Condition No. 42. Renegotiation under
Army Contracts.

(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to Seller will renegotiate the contract price to eliminate therefrom

any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the date of completion or termination of this contract as found by the Secretary.

(2) Seller will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary, (a) be deducted by Buyer from payments otherwise due to Seller under this contract; or (b) be paid by Seller directly to the Government.

(4) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount paid to the Government by Seller or deducted by Buyer from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts withheld by it from Seller hereunder.

(5) As used in this Article:

(a) The term "Secretary" means the Secretary of [20] War or any duly authorized representative of the Secretary, including the contracting officer:

(b) The terms "renegotiate" and "renegotia-

tion” have the same meaning as in Section 403(b) of the Sixth Supplemental National Defense Appropriation Act, 1942:

(c) The term “this contract” means this contract as modified from time to time.

(6) Seller agrees (a) to include in each fixed-price or lump-sum subcontract hereunder for an amount in excess of \$100,000 the foregoing sections (1) to (5) inclusive, and (b) to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this section, and (c) to repay to the Government the amount of any reduction in the contract price of any such subcontract which results from renegotiation thereof by the Secretary and which the Secretary directs the Seller to withhold from payments otherwise due under such subcontract and actually unpaid at the time the Seller receives such direction.

The term “subcontract” includes any purchase order from or any agreement with Seller (i) to perform all or any part of the work to be done under this contract, or to make or furnish all or any part of any articles or structures covered by this contract, (ii) to supply any services required directly for the production of any articles or structures covered by this contract, or any component part thereof, not including services for the general operation of Seller’s plant or business, (iii) to make or furnish any articles destined to become a component part of any article covered by this contract, or (iv) to make or furnish any articles [21] acquired by Seller primarily for the performance of

this contract, or this contract and any other contract with the United States. The term "articles" includes any supplies, materials, machinery, equipment or other personal property.

Special Condition No. 42A. Renegotiation under Navy Contracts.

(a) At any time, when in the judgment of the Secretary, the profits accruing to Seller under this Purchase Order can be determined with reasonable certainty, the Secretary and Seller, upon the written demand of the Secretary, will renegotiate the price with a view to eliminating such profits as are found as a result of such negotiation to be excessive.

(b) In the event that such renegotiation results in a reduction of the price, the amount of such reduction shall, as may be directed by the Secretary, be deducted by Buyer from payments to Seller under this Purchase Order; or be paid by Seller directly to the Government; or be repaid by Seller to Buyer.

(c) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount repaid to Buyer or paid to the Government by Seller or deducted by Buyer from payments to Seller pursuant to directions from the Secretary in accordance with the provisions hereof. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts repaid by or withheld from Seller hereunder.

(d) The term "Secretary" as used herein means the Secretary of the Navy and his duly authorized representatives. [22]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,

Southern District of California—ss.

Dorothy Jane Salk, being first duly sworn, deposes and says:

That she is a citizens of the United States and a resident of Los Angeles County, California; that her business address is 600 Federal Building, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on September 27, 1944, she deposited in the United States Mails in the Post Office at Temple and Main Streets, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Answer of Douglas Aircraft Company, Inc., address to Messrs. Jos. I. McMullen and Leo R. Friedman, 935 Russ Building, San Francisco 4, California, at which place there is a delivery service by United States Mail from said post office.

DOROTHY JANE SALK

Subscribed and Sworn to before me, this twenty-seventh day of September, 1944.

EDMUND L. SMITH,

Clerk, U. S. District Court, Southern District of California

By E. M. ENSTROM, Jr.

Deputy.

REW:ds

9-27-44

[Endorsed]: Filed Sept. 27, 1944. [23]

[Title of District Court and Cause.]

NOTICE

To: Jos. I. McMullen, Esq., Leo R. Friedman, Esq.,
935 Russ Building, San Francisco 4, California

To: T. C. McMahon, Secretary, Douglas Aircraft
Company, Inc., 3000 Ocean Park Boulevard,
Santa Monica, California

You will please take notice that on Monday, the 18th day of December, A. D. 1944, at the hour of 10 o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, the undersigned attorneys for the United States of America will appear before the Honorable Ben Harrison in the courtroom usually occupied by him in the United States Court House, Los Angeles, California, and will then and there present the motion of the United States for leave to intervene in the above-entitled cause; the answer of the United States as intervenor to the complaint in said cause; and will [24] then and there ask the Court to enter an order allowing intervention by the United States, copies of which said motion, answer, and proposed order are hereto annexed.

FRANCIS M. SHEA,

Assistant Attorney General

CHARLES H. CARR,

United States Attorney

RONALD WALKER,

Assistant United States

Attorney

ROBERT E. WRIGHT,
Assistant United States
Attorney.

[Endorsed]: Filed Nov. 17, 1944. [25]

[Title of District Court and Cause.]

RESPONSE TO CERTIFICATION AND MO-
TION BY UNITED STATES TO INTER-
VENE

Comes now the United States of America by its Assistant Attorney General Francis M. Shea and its United States Attorney Charles H. Carr and says:

1. The United States of America, pursuant to the Act of August 24, 1937 (28 U.S.C. 401) and Rule 24 of the Federal Rules of Civil Procedure, moves to intervene and become a party herein for the purposes and with all the rights provided by said Act of August 24, 1937, and by said Rule 24, on the following grounds:

(a) That the constitutionality of an Act of Congress, the Renegotiation Act, [Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Public [26] 528, 77th Congress), approved April 28, 1942, as amended by Section 801 of the Revenue Act of 1942 (Public 753, 77th Congress), approved October 21, 1942; by the Military Appropriation Act, 1944 (Public 108, 78th Congress), approved July 1, 1943; by Public 149, 78th Congress, approved July 14, 1943; and as amended

in full by Section 701 (b) of the Revenue Act of 1943 (Public 235, 78th Congress), enacted February 25, 1944] affecting the public interest is drawn in question in this action and neither the United States, nor any agency thereof, nor any officer or employee thereof, as such officer or employee, is a party hereto; and

(b) That in accordance with Rule 24 (b)(2) of the Federal Rules of Civil Procedure, the United States has claims and defenses which present questions both of law and of fact which are common to the main action. The intervention of the United States will not unduly delay or prejudice the adjudication of the rights of plaintiffs or defendant in this action.

2. Annexed hereto in accordance with Rule 24(c) of the Federal Rules of Civil Procedure is a pleading entitled "Answer of the United States." The United States moves that said pleading be deemed the appearance of the United States in support of the constitutionality of the Act of Congress herein drawn in question, and in opposition to all pleadings, motions and proceedings of the parties hereto that have been or may be made in so far as said pleadings, motions or proceedings are based on the contention that said Act of Congress is in any respect, or in any application, unconstitutional; and that said pleading be deemed the appearance of the United States for the purpose of asserting [27] its claims and defenses under the Federal Rules of Civil Procedure, and in opposition to all pleadings, motions and proceedings of the parties hereto that

have been made or may be made herein in so far as said pleadings, motions or proceedings relate to said claims or defenses.

3. The United States moves for leave to make such motions and take such other proceedings as may be appropriate and lawful and to present evidence in support of the allegations of its answer and as the Act of August 24, 1937 provides.

FRANCIS M. SHEA,

Assistant Attorney General

CHARLES H. CARR,

United States Attorney

RONALD WALKER,

Assistant United States
Attorney

ROBERT E. WRIGHT

Assistant United States
Attorney.

[Endorsed]: Filed Dec. 18, 1944. [28]

[Title of District Court and Cause.]

ORDER ALLOWING INTERVENTION
BY UNITED STATES

This cause came on to be heard on the motion of the United States to intervene and for other relief, and the Court being satisfied that the United States has the right to intervene and become a party herein under the provisions of the Act of August

24, 1937 (28 U.S.C. 401), and under the provisions of Rule 24 of the Federal Rules of Civil Procedure, It Is Ordered:

(1) That the motion of the United States is in all respects granted;

(2) That the United States is hereby made a party to this cause for the purposes and with all the rights provided by said Act of August 24, 1937, and by the Federal Rules of Civil Procedure, and that [29] the United States shall receive notice of all proceedings herein;

(3) That the Answer of the United States, annexed to said motion, is deemed the appearance of the United States in support of the constitutionality of the Act of Congress herein drawn in question, to wit, the Renegotiation Act; and in opposition to all pleadings, motions and proceedings of the parties hereto that have been or may be made insofar as said pleadings, motions or proceedings are based on the contention that said Act of Congress is in any respect, or in any application, unconstitutional; and that such Answer of the United States is deemed the appearance of the United States for the purpose of asserting its claims and defenses under Rule 24 (b)(2) of the Federal Rules of Civil Procedure; and in opposition to all pleadings, motions or proceedings of the parties hereto that have been made or may be made herein insofar as said pleadings, motions or proceedings relate to said claims or defenses;

(4) That leave is granted to the United States to make such motions and take such other proceed-

ings as may be appropriate and lawful and to present evidence at the trial in support of the allegations of its answer and in the manner provided by said Act of August 24, 1937.

Done in open court this 18th day of Dec., 1944.

BEN HARRISON

United States District Judge

[Endorsed]: Filed Dec. 18, 1944. [30]

[Title of District Court and Cause.]

ANSWER OF THE UNITED STATES

The United States of America, intervener herein, for its pleading in intervention alleges as follows:

1. By certificate dated September 12, 1944, the Honorable Ben Harrison, Judge of the United States District Court, certified to the Attorney General, pursuant to the Act of August 24, 1937 (28 U.S.C. 401), the fact that the constitutionality of the Renegotiation Act, an Act of Congress affecting the public interest, is drawn in question herein.

2. Except by this intervention neither the United States nor any agency thereof nor any officer or employee thereof, as such officer or employee, is a party hereto. [31]

3. The constitutionality of the Renegotiation Act has been drawn in question by the allegations of the complaint.

4. The Renegotiation Act affects the public interest for the following reasons among others:

(a) In the light of the experience acquired in the Revolutionary War, the Civil War and the World War, Congress has concluded that the Renegotiation Act is the fairest and most effective method for eliminating excessive war profits.

(b) Effective control of war profits is essential to reduce the tax burden of the nation and to maintain public morale.

(c) The Renegotiation Act is an integral and indispensable feature of the procurement program of the Services and of the program for the control of wartime inflation.

(d) During the period from the enactment of the statute on April 28, 1942, to September 16, 1944, the United States has obtained refunds of excessive war profits in an amount greater than \$2,500,000,000, prior to tax adjustment. In 97.5% of the cases considered during this period, the contractor agreed to the determination made by the renegotiating officials. Similar returns to the United States can be expected under the statute during the remaining period of its operation.

(e) The Renegotiation Act is the expression of the fixed purpose of the Congress and the nation to eliminate war profiteering. [32]

First Defense

5. The Renegotiation Act was enacted pursuant to the war powers of the Congress. It is constitutional and valid and all action taken pursuant thereto in determining the amount of excessive

profits realized by plaintiffs was in all respects lawful.

6. The Declarations of War with Germany, Italy and Japan required the production of the weapons of war, the procurement of equipment and supplies for troops, the construction of camps and camp facilities and the procurement of the instruments of communication and transportation in the largest possible quantity with the greatest possible speed. The full industrial capacity of the United States had to be converted immediately to the production of war material and to meet war objectives. The extent of the procurement problem is indicated by the fact that during the four months of July, August, September and October, 1942, the War Department alone entered into over 1,400,000 contracts. In January, 1942, the total dollar value of contracts executed for war purposes amounted to more than \$9,000,000,000 and in the remaining months of the fiscal year 1942 this figure never fell below \$4,800,000,000. On June 30, 1942, the outstanding obligations of the United States for war supplies and war facilities amounted to nearly \$43,000,000,000. Total expenditures of the War and Navy Departments for the fiscal year ending June 30, 1942, amounting to nearly \$23,000,000,000, exceeded the total military and naval expenditures of the United States from 1789 through the end of the World War.

7. The necessity for procuring war material adequate in quantity and available in time to permit this nation to avert grave military reverses re-

quired that ordinary procurement procedures be drastically modified. Negotiation of contracts was substituted for advertising for bids; letters of intent and letter contracts were widely employed to allow manufacturers to begin production prior to [33] the execution of formal agreements; subcontracting and wide-spread distribution of war orders were required to utilize the full industrial capacity of the nation and procurement officials in the field were given full and final authority to execute contracts in very large amounts. The difficulties were enormously increased by the fact that modern warfare, mechanized and amphibious, has forced the development, production and use of hitherto unknown weapons and supplies. Furthermore, shortages and dislocation of labor and materials required wholesale revisions in established methods of production.

8. Under these circumstances accurate pricing was impossible. Many of the supplies and weapons were entirely new and as to these there was and could be no guiding cost or price experience. Many contractors were required to produce articles which they had never produced before and were thus required to convert their plants and to retrain their labor forces. Quantities, rates of delivery and specifications were and had to be modified in the light of battle experience. These uncertainties were further increased by shortages and dislocation of labor and material supply. Under such circumstances, the contractor was entitled to and did receive prices which would protect him against these

innumerable hazards to production, although it was recognized that as experience was acquired, as conversion problems were solved, as labor was trained, as lines of supply were established, as design and specifications were crystalized, and as mass production was achieved, the cost of production would be greatly decreased and, therefore, that very large profits could be expected.

9. Renegotiation developed as the solution to the problem of meeting the procurement needs of the armed forces with the speed necessary to achieve military objectives, and at the same time eliminating excessive war profits which would place an undue burden upon the [34] taxpayers of the nation, impair the national morale and constitute a threat of war-time inflation. Prior to the enactment of the statute there had been numerous instances of voluntary refunds to the Government of excessive profits and of voluntary renegotiation and revision of contract prices. The War and Navy Departments had, prior to the statute, established cost inspection divisions and had designated renegotiating officials whose duty it was to advise contracting officers concerning fair pricing for future contracts and to renegotiate prices under existing agreements. The Renegotiation Act made obligatory and gave the force of law, with power in the Government to make unilateral determination and with such other modifications as the Congress thought desirable, to the practice which was being developed by the Services and responsible members of the business community.

10. No rigid definition of excessive profits was possible. In fairness to the contractor and to the public, it was necessary that the ultimate price and the ultimate profit to be fixed by an exercise of judgment in the light of the conditions peculiar to the individual contractor. Consideration had to be given to a great variety of circumstances, including the contractor's economy in the use of labor, plant facilities and raw materials, the contractor's efficiency in achieving quantity production at reduced cost, the war contribution of the contractor by invention or by development of manufacturing techniques, the quality and complexity of the item produced, the extent and character of subcontracting, the nature and amount of Government financing, the contractor's cooperation in meeting the changing problems of war production, the risks assumed by the contractor because of close pricing, large inventories, cut-backs in orders or modifications of specifications and such other factors as might at the time of the profit determination prove to be appropriate.

11. In order to achieve the purposes for which the statute was passed and to eliminate, so far as possible, unfair discrimination between contractors the Congress determined that it was necessary that [35] the Act apply to contracts in existence on the date the legislation became effective, that is on April 28, 1942. On that date there were outstanding uncompleted war contracts under which the United States had obligations in excess of \$50,000,000,000. It was in connection with these early contracts that

the probability of excessive profits was greatest and accordingly, that the need for renegotiation was greatest.

12. All the considerations which required renegotiation of prices and profits arising from prime contracts apply with equal force to subcontracts.

13. In view of the great variety of war contracts and in order that the accounting burden might not defeat the ultimate objectives of the statute and in order that the renegotiation law itself should not by its rigidity impede the procurement of war supplies, it was necessary and advisable that the procuring agencies be empowered to act upon the classification of contracts established by the statute.

Second Defense

14. This Court has no jurisdiction of any issue as to which the Tax Court is given jurisdiction by Section 701 of the Revenue Act of 1943 (Pub. 235, 78th Cong.). That section permits any contractor or subcontractor dissatisfied with the Government's determination of his excessive profits to obtain in the Tax Court of the United States a determination de novo of the amount of such profits and the Tax Court is given "exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency." Plaintiffs have not filed a petition in the Tax Court for such redetermination and the time for filing such a petition has expired. [36]

Third Defense

15. The complaint fails to state a claim upon which relief can be granted.

Fourth Defense

16. The United States admits the allegations contained in paragraph I of the complaint; admits the allegations contained in paragraph II of the complaint; admits that the value of the property and property rights involved herein exceeds the sum of \$3,000, exclusive of costs and interest, but alleges that it is informed and believes that such value is not more than \$27,580.80; alleges that it is informed and believes that the defendant did become indebted to the plaintiffs in the sum of \$27,580.80 and alleges that by reason of the orders and determinations made by Robert P. Patterson and described in the complaint said sum of \$27,580.80 is not now owing to the plaintiffs but is now owing to the United States; admits that an actual controversy exists with relation to the rights of the parties and pertaining to the payment of the alleged indebtedness; admits the allegations in paragraphs V(a), V(b), V(d) and V(e) of the complaint; admits that plaintiffs were and are engaged in the manufacture, production and sale of mechanical fittings and of airplane parts, manufactured and produced in the City of Los Angeles, County of Los Angeles, State of California; denies that all of plaintiffs' business for the fiscal year ending December 31, 1942 was the basis on which the order of February 2, 1944 was made and alleges that only

so much of plaintiffs' business as was subject to renegotiation pursuant to the Renegotiation Act was the basis of such order; admits that plaintiffs have made available to the United States and to its agents charged with the administration of the Renegotiation Act books, papers, records, documents and accounts; alleges that it is informed and believes that on or about September 14, 1942 defendant prepared and sent to plaintiffs a letter dated September 14, 1942, a true [37] copy of which is attached hereto as Exhibit "A", and plaintiffs on November 14, 1942 replied by letter dated that day, a true copy of which is attached hereto as Exhibit "B"; admits that by virtue of the order made by the Under Secretary of War on May 1, 1944, defendant is without right, power or authority to pay to plaintiffs the sum of \$27,580.80 or any other sum subject to that order.

The United States denies each allegation of the complaint not admitted, qualified or specifically denied.

Fifth Defense

17. With respect to all matters in controversy in this suit, all action taken by Henry L. Stimson and Robert P. Patterson, and by all persons acting for them or under their direction or on their behalf was taken pursuant to and was authorized or required by the Renegotiation Act.

Wherefore, the United States prays that the contention that the Renegotiation Act is unconstitutional be rejected and that the Court adjudge

and declares that such Act is constitutional and that the United States have such other and further relief as to the Court shall seem just and proper.

FRANCIS M. SHEA,

Assistant Attorney General

CHARLES H. CARR,

United States Attorney

RONALD WALKER,

Assistant United States

Attorney

ROBERT E. WRIGHT,

Assistant United States

Attorney

District of Columbia,

City of Washington—ss.

Robert P. Patterson, being duly sworn, deposes and says that he is and at all times since December 19, 1940, has been the Under Secretary of War of the United States; that he has read the foregoing answer and knows the contents thereof, and that the matters therein set forth are true, save that matters averred upon information and belief are believed to be true to the best of affiant's knowledge.

ROBERT P. PATTERSON

Sworn to before me this 31st day of October, 1944.

[Seal]

ANNA C. LANIGAN,

Notary Public.

My commission expires June 15, 1946.

[Printer's Note]: Exhibits "A" and "B" are set out in full at pages 25 and 26.

[Endorsed]: Filed Dec. 18, 1944.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To: Joseph I. McMullen, Esq.; Leo R. Friedman,
Esq., 935 Russ Building, San Francisco 4, Cali-
fornia

You will please take notice that on February 19, 1945, at the hour of 10 o'clock in the morning of said day, the undersigned attorneys for the defendant in the above-entitled cause will appear before the Honorable Ben Harrison, one of the Judges of the District Court of the United States in and for the Southern District of California, in the courtroom usually occupied by him in the United States Court House at Temple and Main Streets in the City of Los Angeles, and will then and there present the motion of the defendant for a summary judgment; which said motion has been filed in the office of the Clerk of said court and a copy of which said motion is attached hereto.

FRANCIS M. SHEA

Assistant Attorney General

CHARLES H. CARR,

United States Attorney.

RONALD WALKER,

Assistant United States Attorney.

ROBERT E. WRIGHT,

Assistant United States Attorney.

[Endorsed]: Filed Jan. 23, 1944.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Come now the defendant, Douglas Aircraft Company, Inc., and the intervener, the United States of America, and move for summary judgment for defendant on the ground that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law and on the further ground that the complaint fails to state a claim upon which relief can be granted. The court lacks jurisdiction to try in this action any issue as to the amount of the excessive profits received by plaintiff. (Revenue Act of 1943, Public 235, 78th Cong., 2d Sess., Title VII, Sec. 403(e)).

The motion is based upon the verified answer of the United States, the affidavit of Robert P. Patterson, the affidavit of H. Struve Hensel, and the pleadings, files and records in this case.

FRANCIS M. SHEA,
Assistant Attorney General

CHARLES H. CARR,
United States Attorney.

RONALD WALKER,
Assistant United States Attorney.

ROBERT E. WRIGHT,
Assistant United States Attorney.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America

Southern District of California—ss.

M. Jeanne Black, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 600 Federal Building, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on January 23, 1945 she deposited in the United States Mails in the Post Office at Temple and Main Streets, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Motion for Summary Judgment and Notice of Motion addressed to Messrs. Joseph I. McMullen and Leo R. Friedman, 935 Russ Building, San Francisco 4, California, at which place there is a delivery service by United States Mail from said post office.

M. JEANNE BLACK

Subscribed and sworn to before me, this twenty-third day of January, 1945.

[Seal]

EDMUND L. SMITH

Clerk, U. S. District Court,
Southern District of
California

By JOHN A. CHILDRESS

Deputy

REW:mjb

1-23-45

[Endorsed]: Filed Jan. 23, 1944.

[Title of District Court and Cause.]AFFIDAVIT OF ROBERT P. PATTERSON
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

District of Columbia—ss.

Robert P. Patterson, being duly sworn, deposes and says:

1. I am Under Secretary of War of the United States and have held that office, which was created by the Act of December 16, 1940, 54 Stat. 1224, since December 19, 1940. From July 30, 1940 to December 19, 1940 I was The Assistant Secretary of War.

2. By authority of various statutes and by various delegations of authority from The Secretary of War, I am, and have been both as Under Secretary and as The Assistant Secretary of War, charged with the supervision of the procurement of all military supplies and of other business of the War Department and the Army pertaining to production and procurement.

3. The statements made in this affidavit are based upon information acquired by me in my offi-

cial capacity and which I believe to be true and accurate.

Preliminary Statement

4. Wartime procurement for the military establishment differs radically from procurement in times of peace. Speed in production at once becomes all-important. Industry is called upon to produce an entire complex of new products, constantly changing in design and purpose. Quantities of both old and new products, far beyond those previously manufactured, are suddenly demanded, and in the shortest possible time. For the production of these needed items, existing plants, machinery and equipment have to be converted from producing peacetime civilian goods to meet the different and expanded needs of the armed forces. Even the marginal producers have to be used in order to meet these needs. In addition, hundreds of new plants, new machinery and new equipment have to be constructed, installed, and put to work. The nation's manpower has to be reallocated, almost overnight, to adjust to the gaps caused by the transfer of millions from production to the armed forces, and to the springing up of new industries and new areas of production. Enormous dislocations in transportation, and in the supply of raw materials have to be ironed out.

5. The necessary result of this combination of circumstances is that the war procuring agencies cannot use normal methods of procurement. The pressing need for speed requires the abandonment of drawn-out negotiation and the careful surveys of

all relevant factors which sound purchasing would otherwise require. Competition necessarily wanes and no longer offers an adequate guide to the prices which should be paid. Above all, the forecasting of costs of production becomes, in large measure, a matter of informed guessing rather than of real cost analysis. This is true in the case of new products, new plants, and new producers; it is likewise true, though perhaps in lesser degree, wherever the quantities to be manufactured are sharply increased over pre-war amounts. Accordingly, advance prices quoted in good faith by manufacturers in a large number of cases have little relation to costs actually experienced in the course of production. Furthermore, many manufacturers feel unable to quote firm prices without including reserves to cover many contingencies the occurrence of which might skyrocket their costs, and so overturn all their estimates.

6. These were the conditions of wartime procurement, after December 7, 1941, and the War Department had to force its procurement activities into their mold. Efforts were made, of course, to develop contractual devices which would minimize the paramount difficulty in estimating production costs. The cost-plus-fixed-fee contract was used where unavoidable, but this form has the disadvantage of removing financial incentives to efficiency and of imposing a heavy burden of auditing upon the Government and the contractor. Escalator clauses, permitting prices to be adjusted according to fluctuations in indices of labor and material costs, were also used but proved unworkable. Letters of

intent, under which manufacture was commenced prior to the negotiation of a formal contract, helped to speed production, but could not, of course, solve the ultimate problem of decreasing costs and preventing excessive profits.

7. Shortly after the declarations of war, both the legislative and the executive branches of the Government realized that excessive wartime profits were certain to accrue unless counter measures were taken. The evil effect of such wartime excessive profit on the morale of the fighting forces and the civilian population, as well as the unnecessary financial burden upon the Government, could not be ignored. The example of the last war was still fresh. Many war contractors realized the dangers and inequities resulting from such excessive profit, and some of them made refunds of excessive profits or voluntarily reduced their prices. In the spring of 1942, the War Department developed cost analysis units to check, so far as practicable, on production costs, and set up a price adjustment board to negotiate with contractors for voluntary price reductions and refunds of past payments. Tentative policies as to what profits were excessive were established and meetings with contractors had. At the same time, there came into use contract clauses providing for the renegotiation or redetermination of contract prices after an initial period of production had laid a basis for the proper estimation of costs. We hoped that these means would keep incentives to efficiency alive and at the same time would tend to eliminate undue profits such as were then coming to light.

8. The Congress apparently felt, however, that these contractual measures, resting as they did upon the voluntary cooperation of a relatively small number of war contractors, did not provide enough certainty that excessive profits would be eliminated. The Vinson-Trammell Act, limiting profits on aircraft and ship construction, had been repealed in 1940, but an effort was made to revive it. In March, 1942, the War Department and the War Production Board opposed such legislation on the ground that a flat percentage profit limitation would impede production and would be unfair to many contractors and too generous to others. After the Case amendment imposing such a flat percentage limitation on profits from war contracts had been adopted by the House of Representatives late in March, 1942, the armed services and the War Production Board offered a substitute proposal giving statutory authority to the process of voluntary renegotiation which had been developing. Congress adopted the principle of renegotiation with which the armed services were in accord (rather than the principle of a flat percentage limitation of profits), and it also endowed the procuring agencies with power to determine excessive profits when no bilateral agreement could be reached with the contractor. I believe that this addition by the Congress of the power of unilateral action was a wise and a necessary one, and that without it renegotiation would not have accomplished anything like the results that have been achieved.

9. The purpose of this affidavit is to present the

facts showing in greater detail, (a) the nature and extent of the procurement problems of the Army after the declaration of war, (b) the need for renegotiation and limitation of profits of war contractors and the steps which had been taken in that direction prior to the enactment of the renegotiation statute, and (c) what statutory renegotiation has accomplished.

The Army's Procurement Problems Subsequent to the Declaration of War

10. Immediately after the attack on Pearl Harbor, on December 7, 1941, the War Department's procurement program was sharply accelerated to meet the new requirements imposed upon the country and the Army by the sudden involvement of the United States in the war. The defense procurement program had been large, but the effort was minor in comparison with that necessitated by the demands of active warfare. Supplies, equipment, housing, ammunition, and weapons had to be secured, in the least possible time, for our rapidly expanding armed forces, and for the anticipated needs of a war to be fought on two sides of the globe. In addition, increased supplies for the nations with which we were allied had to be produced with the greatest possible speed. All phases of procurement were stepped up: production of the weapons of war, such as guns, planes, tanks; construction and equipment of camps; procurement of equipment and supplies for the troops; construction of plant facilities; production of the means of communication and transportation.

11. The extent of the problem facing the procurement agencies can be judged from the goals set by the President in his message to Congress of January 6, 1942. The President stated:

“I have just sent a letter of directive to the appropriate departments and agencies of our government ordering that immediate steps be taken:

“First to increase our production rate of airplanes so rapidly that in this year 1942 we shall produce 60,000 planes, 10,000 by the way, more than the goal that we set a year and a half ago. This includes 45,000 combat planes, bombers, dive bombers, pursuit planes. The rate of increase will be maintained, continued, so that next year, 1943, we shall produce 125,000 planes, including 100,000 combat planes.

“Secondly, to increase our production rate of tanks so rapidly that in this year, 1942, we shall produce 45,000 tanks, and to continue that increase so that next year, 1943, we shall produce 75,000 tanks.

“Third, to increase our production rate of anti-aircraft guns so rapidly that in this year, 1942, we shall produce 20,000 of them, and to continue that increase so that next year, 1943, we shall produce 35,000 antiaircraft guns.

“And fourth, to increase our production rate of merchant ships so rapidly that in this year, 1942, we shall build 8,000,000 deadweight tons, as compared with a 1941 completed production of 1,100,000. And finally, we shall continue that increase so that next

year, 1943, we shall build 10,000,000 tons of shipping."

Illustrative of the tremendous undertaking facing both American industry and the procurement agencies is the fact that the total number of planes (military, commercial, and private) produced from 1903 to 1940 was some 331½ per cent less than the number scheduled for the year 1942 alone, and that procurement of planes for the Army during 1942 was over 250% greater than in 1941. For the fiscal year ending June 30, 1942, the money appropriated for War Department procurement and construction was more than six times the amount appropriated in the fiscal year 1941. One-third of the total was appropriated by the Congress in the first half of the fiscal year 1942, before the United States had been attacked; after Pearl Harbor, the Congress tripled the new procurement funds made available earlier in the fiscal year.

12. To fulfill the requirements of this expanded war program, a vast number of contracts had to be made, as quickly as possible, for supplies, weapons, and munitions of all kinds. Attached as Exhibit A is a chart (based on information furnished by the War Production Board) showing the number and dollar value of contracts for all types of war materials entered into each month from July 1941 through June 1942 by the various procuring agencies. The tremendous increase which occurred in January 1942 and continued through the remaining months of that fiscal year is clearly shown by this

chart. In November, 1941, the total dollar value of such contracts was \$1,506,000,000; in December it jumped to \$3,131,000,000; and in January 1942 to \$9,456,000,000; in the remaining months of the fiscal year it never fell below \$4,800,000,000. The chart, it should be noted, understates both the total number of contracts and their total dollar value, since it excludes (1) contracts with a value of less than \$50,000 (of which there were a vast number), (2) contracts for subsistence, and (3) construction contracts. An idea of the comparison between the total number of contracts entered into by the War Department prior to Pearl Harbor and thereafter can be gained from the fact that the number of contracts for the fiscal year ending June 30, 1941, was 667,364, while that for the four months of July, August, September, and October 1941 alone was 1,408,141. All these figures concern only prime contracts, but the vast stimulating effect of this expanded volume of prime contracts upon subcontracting of all tiers is readily apparent. On December 31, 1941, War Department obligations for supplies and new capital facilities amounted to more than 9 billion dollars, but on June 30, 1942, they amounted to nearly 43 billion dollars. War Department expenditures for delivered supplies were nearly 4 billions on December 31, and were more than 13 billions on June 30. In the last six months of the fiscal year ending June 30, 1942, War Department contractual activity and the delivery of supplies were four times greater than in the first six months. Some conception of the vast scope of

the procurement activity of the armed services after the attack on Pearl Harbor can be gained from the fact that the total expenditures of the War and Navy Departments for the one fiscal year ending June 30, 1942 (\$22,905,000,000) considerably exceeded the total military and naval expenditures of the Government from 1789 through the end of World War I.

13. To meet these accelerated demands, the armed forces had to call, in largest measure, upon private industry which, prior to December 7, 1941, was devoting only 25% of its total production to defense work, and of this amount, by far the largest proportion resulted from the use of existing idle capacity and the establishment of new facilities rather than from the conversion of existing facilities geared to civilian production. Little stoppage of civilian production had occurred prior to December 1, 1941. If the imperative needs of the armament program were to be satisfied, wholesale conversion of existing production facilities to a war economy would have to occur. By the end of 1942, the proportion of manufacturing industry devoted to war production amounted to upwards of 45%, and presently this percentage is estimated at 60%. Some of this increase is, of course, attributable to the continued construction and use of new facilities, but the greater part of it has come from conversion of existing facilities since December 1941.

14. The armed forces were thus forced to grapple with major difficulties stemming from (a) the greatly increased demands for supplies of all types,

(b) the accelerated program requiring immediate production, and (c) the urgent and rapid conversion of the great mass of American industry to war work and the large-scale use of new facilities. Other acute problems were caused by (d) the demand for new products not previously manufactured, and by the constant modification of specifications to reflect improvements in design or changing needs, and (e) by the current uncertainty in the amounts of materiel to be procured, and the grave difficulties in the supply and cost of labor and materiel which were daily arising at that time:

(a) The greatly increased demand for supplies made the accurate forecasting of costs very difficult. Starting costs were bound to be higher than those incurred after mass production had begun; but the extent to which quantity production would bring a sharp drop in costs could not be estimated either by the Government or by contractors, and the latter were naturally very cautious in prophesying about their future costs. This was frequently true in the case of standard articles previously manufactured in small quantities and was uniformly true in the case of new products.

(b) The urgent need for placing orders and starting production as soon as possible placed the importance of speed far above thorough analysis or careful negotiations. Time was of the essence, and the Government personnel entrusted with negotiation and procurement were, of necessity, too few and too overburdened to follow the normal procedure of careful procurement. There was simply no time to

collate and check the cost information which in less abnormal times would be required; and, of course, such cost information pertinent to wartime production was frequently nowhere obtainable.

(c) The conversion of peacetime facilities to war work meant that cost data for the new production were unavailable, even for established plants. And in the hundreds of new plants producing war goods, only the roughest guess as to the costs of manufacturing which would be experienced during actual production could be made. Marginal producers, and those with no experience with the product or with the greatly increased quantities they would be called upon to produce, had to be used.

(d) War on the scale and under the conditions we are fighting calls for unceasing development, production, use, and improvement of countless new supplies and weapons. The demands of amphibious warfare, for instance, led to the development of amphibian boats and cargo carriers. The mechanization of modern warfare forced the development and rapid production of such items as tanks and motorized gun carriers as well as of the weapons employed against them: anti-tank guns and grenades, armor-piercing ammunition, self-propelled mounts, and anti-aircraft guns. The spurt and rapid changes in aircraft development are common knowledge, as is the growth of communication and detection devices. Changes in design and material also frequently resulted from shortages of previously used components. The use of steel had to be severely limited wherever a less critical material could be

substituted. Motor vehicle cargo bodies, for example, were converted from steel to wood. Acute shortages of copper and brass led to other changes in accepted design. Great use was made of plastics in order to release critical metals. This activity can be partly epitomized in the summary statistic that during the fiscal year 1942 approximately 1,200 Army specifications were reviewed, and revised or approved, and about 425 specifications were completely cancelled.

(e) Material and labor shortages were acute in the spring of 1942. The consequence was that it was generally difficult, except within the widest limits, to establish accurate schedules for the production of supplies. The Army's requirements had to be drastically reduced, in the months from February to June, 1942, because of these factors, and these changes and reductions were reflected in the War Department's procurement program. An equally important consequence was the difficulty of gauging both the costs and the time of performance because of the shortages and anticipated rise in the costs of labor and materials.

15. All these factors made advance pricing a haphazard process in which the war procurement agencies could put little trust. The situation with which we were faced is well summarized in the following two statements (one by a Government agency and the other by a large war contractor) with which I am in full accord and which I believe to be an accurate description of the procurement situation as it existed after the coming of the war. The following is an excerpt from the Introduction to the Renego-

tiation Regulations issued by the War Contracts Price Adjustment Board:

“The war program creates problems of procurement and production unprecedented in scale and complexity. War materials of all kinds are required in enormous quantities with the greatest possible speed. The munitions program expanded with such rapidity that contracting officers were hard pressed to place contracts in time to meet the accelerated requirements. In order to avoid delay, they had to make contracts without adequate data. Obtaining the material was the first issue. Many contractors were asked to produce articles which had never been produced before and which were subject to frequent change. Others were asked to produce articles which were new to them. Still others, who had produced articles in small quantities, were asked to produce them in amounts far beyond their previous experience. Quantities needed, the rates of delivery and specifications had often to be revised in the light of experience and the demands of war. Shortages of material, priorities, and allocations increased the uncertainty of production.

“Besides these circumstances, contractors and contracting officers were frequently unable to make an accurate forecast of costs on which to base prices. During the period of transition, costs were certain to be high. New facilities had to be obtained, new personnel employed and trained to new methods and new sources of supply developed. How long this would take was itself uncertain. After the contrac-

tor got into production, greater efficiency, improved methods, and increased volume could be expected to reduce costs sharply.”

The following are excerpts from a report by the General Motors Corporation, in September 1943, to the War Department Price Adjustment Board:

“With the advent of the war-production program, the automatic check on pricing policy which had been furnished by competition during peacetime could no longer be relied upon. The Corporation was obliged to undertake the manufacture of many products which were entirely foreign to its own past operations. In many instances, these products had not been produced by any manufacturers in the volume contemplated by the war program. As a result, there was no ready-made yardstick against which the Corporation could measure proposed prices, and it became necessary to rely largely upon the judgment of the several general managers of the operating divisions and the Government contracting officers, as well as whatever limited experience might be available from other producers, as to the reasonableness of the cost estimates and prices submitted. In certain cases, the only practical solution of the pricing problem has been to insert clauses into contracts providing that prices would be reviewed as soon as representative cost experience had been obtained as a result of volume production.”

“Under these circumstances, it has been impossible to predict with any degree of certainty what

the operating results of particular contracts might ultimately be. It therefore became imperative for the Corporation to establish as soon as possible a basic pricing policy which would take into account these unusual conditions and insure that proper and effective pricing control would be obtained. In establishing this policy, the primary considerations were two-fold. First, it was recognized that in producing war material, the checks of normal competition had been removed, and that the peacetime conception of desirable profit margins, as previously described, had to be modified. Second, it was considered essential to maintain, as far as possible, the Corporation's normal method of doing business on a decentralized basis, with primary responsibility for contracting, pricing and production resting upon the divisional general managers, subject to the over-all general policies of the Corporation. * * *

“The policy of taking contracts on a fixed-price basis whenever practicable was adopted (despite the increased risk) because of the greater incentive to efficient operation afforded by this type of contract as compared with the cost-plus-fixed-fee type. However, it was recognized that the divisions were undertaking the production of war materials which were not only new to the Corporation, but had not been manufactured by anyone on a ‘mass-production’ basis. Therefore, there was always a possibility that initial cost estimates on certain contracts, even though they appeared reasonable to the divisional general managers and to the Government contracting officers at the time the estimates were pre-

pared, might turn out to be higher than actual costs of production as volume increased, when designs were changed, and as manufacturing experience was obtained. * * *

16. A graphic illustration of the way in which all the factors of uncertainty listed above combined to make the advance estimation of costs extremely difficult in 1941 and 1942 is furnished by the experience of the General Motors Corporation. That company is one of the largest peacetime manufacturers of automotive products, its accounting and auditing procedures are superior, and its ability to forecast the costs of manufacture of automotive products would far outrun that of most other producers. Nevertheless, as the company itself fully realized (see paragraph 15 above), even it was in no position to estimate its costs with any acceptable margin of accuracy. General Motors accepted contracts containing redetermination provisions, under which an original price based on the best available estimate of costs was established, with revisions made after the costs of a preliminary run of 1,000 units and a test run of a further 1,000 units were available. The price for the remainder of the contract was determined on the basis of the test run. The results obtained under two of these contracts were as follows:

(a) Medium Tank (per unit):

Original price (middle of 1941).....	\$67,401
	Estimated redetermined value
Preliminary run (March 1942-December 1942), 1,000 units (including preproduction expenses).....	\$50,947
Test run (December 1942-February 1943), 1,000 units	39,079
Remainder (February 1943-August 1943); 1,053 units	39,285

(b) Light tank (per unit):

Original price (set during 1941).....	\$45,000
	Estimated redetermined value
Preliminary run (April 1942-October 1942), 1,000 units	\$34,625.99
Test run (October 1942-December 1942), 1,000 units	26,972.96
Remainder (December 1942-February 1943), 1,266 units	28,347.09
2nd Preliminary run (February 1943-June 1943), 1000 units	24,658.65

(c) The following table illustrates the sharp decrease in costs following a sharp rise in quantity of production, and the gaining of manufacturing experience. The figures represent revisions of General Motors Corporation's price for the .50 cal. heavy barrel machine gun:

	Units	Price
Original price (Aug. 1941-Dec. 1941).....	1,308	\$868.07
1st revision (Jan. 1942-Mar. 1942).....	2,830	632.55
2nd revision (Apr. 1942-May 1942).....	3,247	532.00
3rd revision (May 1942-Sept. 1942).....	14,717	413.60
10th revision (June 1943-Aug. 1943).....	3,500	300.59

17. Faced with these difficulties of estimating production costs and also with the pressing need for speed in procurement, the War Department naturally chose to emphasize, after December 7, 1941, the speedy placing of a mass of contracts. Pressure to obtain supplies was already great before the attack on Pearl Harbor, but thereafter it was made even clearer to contracting officers that they were expected to place the increasing load of orders assigned to them with the least possible delay. The war would not rest to allow proper negotiation, and the War Department made it clear that the primary

goal was speed in obtaining the necessary equipment and supplies. Illustrative is P. & C. General Directive No. 8,¹ issued January 14, 1942 (attached hereto as Exhibit B), which stated that "price is a secondary consideration as compared with speed and efficient production," and "speed in placing orders now authorized is important, but speed of production as a whole during the next 18 months is of even greater importance. * * * War calls for the same boldness and imagination in procurement as it does in meeting combat conditions in the field." War Production Board Directive No. 2, March 3, 1942, placed "primary emphasis * * * upon securing delivery in the time required by the war program." P. B. General Directive No. 34, dated April 9, 1942, which coordinated War Department rules concerning purchases, reiterated the WPB standards and added that in giving effect to these policies "it is recognized that it may be necessary to purchase at other than the lowest price offered."

18. To implement this policy of speedy procurement, and at the same time to adjust, as best it could, to the conditions of wartime production, the War Department adopted several procurement devices and policies.

¹P. & C. General Directives were issued, under my direction, by the Purchases and Contracts Branch of the Office of the Under Secretary of War; this branch later became the Contract Division, and the directives were entitled CD General Directives; in March 1942, the unit became the Purchases Branch, Procurement and Distribution Division, Headquarters, Services of Supply, and the directives were entitled PB General Directives.

(a) Peacetime War Department procurement, with certain exceptions, was accomplished through advertising for bids. At the beginning of the general emergency it was foreseen that this method would prove impracticable for emergency procurement, and the Act of July 2, 1940 (Public No. 703, 76th Congress) authorized contracting without advertising for national-defense purposes. This authority was widely used for the purchase of such supplies as aircraft and tanks, but in many fields it was believed that the Government could still avail itself of the safeguards of letting contracts by advertising. After the declaration of war, however, it was seen that negotiation would have to supplant advertising almost entirely. The increased need for speed in procurement, the necessity of employing even high-cost producers, the unfamiliarity of most contractors with the products or the quantities they were called upon to manufacture, and all the uncertainties of the period described above, combined to render advertising unsuitable to wartime procurement. Accordingly, on December 16, 1941, the Secretary of War issued a directive broadly extending the authority to make procurements without advertising, and by directive of December 17, 1941 (P. & C. General Directive No. 81) I ordered "that the authority to place orders without advertising be utilized in all cases where that method of procurement will expedite the accomplishment of the war effort." The First War Powers Act of 1941 (approved December 18, 1941), and Executive Order No. 9001, issued December 27, 1941, confirmed and

extended the power to make contracts by negotiation, and thereafter the use of that method became dominant in Army procurement. On March 3, 1942, War Production Board Directive No. 2 required all of our war contracts to be negotiated (unless specific authority to advertise were granted), and on March 4, 1942, this rule was made effective in the War Department by CD General Directive No. 25.

(b) Speed in procurement and the utilization of all available producing facilities required decentralization of procurement, increased subcontracting, and widespread distribution of war. orders

(1) Prior to December, 1941, considerable decentralization had been effected; the limits of the dollar amounts of contracts which could be approved by echelons below the office of the Under Secretary of War had gradually been raised to \$500,000. On December 16, 1941, the Secretary of War directed a sweeping decentralization of procurement, and on the next day I issued P. & C. General Directive No. 81, empowering the chiefs of the supply arms and services to approve contracts up to \$5,000,000, and authorizing them to decentralize still further. This directive stated that "In order to enable orders to be placed in the quickest possible time, it is desired that chiefs of supply arms and services decentralize to their field agencies the actual work of procurement and the placing of awards and contracts to the greatest extent compatible with efficiency and proper safeguarding of the public interest."

(2) Subcontracting had also been fostered from the

beginning of the emergency, since it was foreseen that full defense production could not otherwise be achieved. With the outbreak of the war, P. & C. General Directive No. 8, dated January 14, 1942 (Subject: "Selection of Contractors for war production"), strongly emphasized this need and required procurement official to insist upon subcontracting: "The heavy procurement program and need for speed in production make vital the best utilization of every facility." (3) For the same reasons, the policy of the widespread distribution of defense orders was adopted. This policy was partially crystallized in War Production Board Directive No. 2, March 3, 1942, which stated "that contracts shall be placed so as to conserve, for the more difficult war-production problems, the facilities of concerns best able, by reason of engineering, managerial, and physical resources, to handle them. Accordingly, contracts for standard or other items which involve relatively simple production problems shall be placed with concerns, normally the smaller ones, which are less able to handle the more difficult war-production problems."

(c) Letters of Intent were used early in the emergency to expedite production. Through use of this form of contract, the contractor could begin manufacturing the needed supplies before agreement had been reached on a definite price, or the full extent of the procurement determined. The slightly different letter contract form was authorized in May and June, 1941, for the same purpose. On December 17, 1941, there was issued at my direction, P. & C.

General Directive No. 88, which ordered the more extensive use of letter contracts "in the interest of expediting procurement." On January 16, 1942, revised letter contract forms were issued, and on January 13, 1942, a letter purchase order (to replace the letter of intent) was issued and its use directed by contracting officers "where the necessity for the supplies is so urgent as to render prior negotiations in respect to price, schedule of deliveries, or other terms impracticable, or where negotiations in respect thereto have failed to result in an agreement" (P. & C. General Directive No. 5). These policies were emphasized to the contracting personnel by the various supply arms and services. For instance, the Signal Corps directed (April 20, 1942) that in no case in which time was of the essence should the selection of a satisfactory contractor be delayed to await agreement on the price; "if immediate agreement cannot be reached on the price, a letter purchase order or a letter of intent should be issued to the contractor selected, so that production can be initiated pending the negotiation of price." Pursuant to these directions, these contract forms were used in great number throughout the War Department.

19. Contractual devices were also adopted in an attempt to overcome the insistence of contractors on covering all the contingencies of wartime production into their prices.

(a) One means, of course, of eliminating the probability of excessive profits and of tying the contract price to actual costs is the cost-plus-fixed-fee

form of contract. The Act of July 2, 1940, authorized the use of this form, and War Department directives of the same day permitted its use when "deemed necessary in the interest of the United States in order to accomplish or expedite the national defense program." But this form of contract has never been favored by the War Department, for the reasons that it offers no financial incentive to control or reduce costs and that it requires an inordinate amount of auditing and paper work. However, its use was found necessary in some cases. P. & C. General Directive No. 81, dated December 17, 1941, provided that "contracts will be negotiated on a cost-plus-a-fixed-fee basis only when the use of that form of contract is essential." Later directives have continued and strengthened that policy and have consistently urged the conversion of cost-plus-fixed-fee contracts to the fixed-price basis.

(b) Another attempt to meet the objections of suppliers who felt that they could not quote firm prices because of anticipated rises in material and labor costs, were escalator—price adjustment clauses. On September 17, 1941, the War Department approved a price adjustment (escalator) article to be used "only in exceptional cases where the facts justify their use." (P. & C. General Directive No. 48). It was expressly required that all contracts containing the escalator clause also include an article providing for termination of the contract for the convenience of the Government. On December 17, 1941, P. & C. General Directive No. 86 issued certain amendments, mainly concerning indirect

labor and material costs, to the approved clauses. Copies of these two directives (including the escalator clauses) are attached hereto as Exhibits C and D. Escalator clauses present some of the undesirable features of cost-plus contracts. Their administration is complex, and they require extensive accounting and auditing.

These devices were not favored by the War Department, for the reasons I have stated. By themselves, they were not satisfactory or effective methods for confining profits to reasonable levels or for decreasing production costs. Other means of attaining these ends had to be developed.

Need for Renegotiation and Profit Limitation and Measures to That End

20. At the beginning of the limited emergency in 1939, the only applicable statutory limits on profits from the sale of military or naval supplies were contained in the Vinson-Trammell Act of March 27, 1934, as amended (relating to naval vessels) and the Merchant Marine Act of 1936, as amended (relating to construction of merchant ships). The Act of April 3, 1939, extended percentage profit limitation to cover Army aircraft contracts. The percentage of profit allowed to contractors was lowered to approximately 8% by the Act of June 28, 1940, but the Second Supplemental National Defense Appropriation Act, 1941, enacted September 9, 1940, provided that as to aircraft the old limitation of 12% was to prevail.

21. Manufacturers of war products, particularly

aircraft manufacturers, asserted that they could not take Government contracts in the face of these profit limitations. Many subcontractors were reluctant to work for them under Government prime contracts at 8% or 12% when they could make 15% or 20% working for civilian manufacturers. Moreover, many subcontractors were unwilling to take contracts which involved the necessity of keeping elaborate cost records subject to Government audit. It was therefore decided that the Vinson Act would have to be suspended, and that an excess profits tax should be levied. Accordingly, the Second Revenue Act of 1940, containing the excess profits tax, suspended the profit limitation statutes applicable to Army and Navy contracts entered into after December 31, 1939, or uncompleted on that date by contractors and subcontractors subject to the new excess profits tax. Thereafter, until the passage of the Sixth Supplemental National Defense Appropriation Act of 1942, the only statutory provisions concerning war or defense contracts were those of the excess profits tax.

22. From the beginning of 1942, officials of the War Department were aware that a necessary result of the unstable purchasing conditions of war procurement would be the accumulation by many contractors and subcontractors of excessive profits which would not be siphoned off by the existing tax legislation. Publication of financial reports of war contractors for 1941 indicated the tremendously increased profits derived from the more limited defense program. The decision of the Supreme Court

in *United States v. Bethlehem Steel Corporation*, 315 U. S. 289, decided in February 1942, reemphasized the extent of the profits which had been made in World War I. On March 23, 1942, the Naval Affairs Committee of the House of Representatives conducted a hearing on the defense profits of Jack & Heintz, Inc. (Hearings before the Committee on Naval Affairs, House of Representatives, 77th Cong., 2d Session, pursuant to H. Res. 162, Vol. 1), and the information divulged at that hearing on the exorbitant profits made by that concern received wide publicity. Other information of the same character was developed by the Naval Affairs and other Congressional Committees and was made available to the War Department. The War Department and at least one of the supply services (the Signal Corps) established rudimentary cost analysis units to study the manufacturing cost, of Army suppliers, and preparations were made to review and check contract prices.

23. The need for eliminating excessive profits obtained from war production is as paramount as it is obvious. Excessive profits mean increased tax and war loan burdens on the public and increased pressure toward inflation. Undue profit margins are also a cushion for wasteful and costly manufacture. Perhaps most important is the destructive effect of excessive war profits upon the morale of men in the armed services and of civilian workers. The sharp reaction to war profits which occurred after World War I is eloquent testimony of the significance of this factor.

Voluntary Renegotiation

24. During the defense period, prior to December 7, 1941, there had been a certain number of voluntary refunds and price reductions by defense contractors. In June and July, 1941, War Supplies, Ltd., the Canadian Government corporation through which the United States purchases in Canada, agreed to refund to the War Department all profits over 10% of cost. In October 1941, it was found advisable to issue a directive on the taxable character of sums received by contractors but voluntarily refunded to the United States. P. & C. General Directive No. 54, October 7, 1941, stated that: "From time to time a contractor with the Government discovers that his profits are larger than he had at first estimated, and desires to refund the excess to the United States. Under these circumstances, certain contractors have hesitated lest in making the refund they subject themselves to a tax penalty, either through paying or having paid income taxes on the profits received or through being forced to pay a gift tax on any refund." But voluntary renegotiation took on much greater scope in early 1942.

25. On the same day that they appeared before the Naval Affairs Committee (March 23, 1942) officials of Jack & Heintz, Inc. met with procurement officials of the War Department for the purpose of reviewing the Company's Army contracts. It was agreed that the contractor would reduce its prices on its various contracts, totaling somewhat over

\$50,000,000, by an over-all amount slightly in excess of \$10,000,000. On March 28, 1942, our procurement officials met with officials of Continental Motors Corporation to review that company's aircraft contracts. After negotiations, the company voluntarily agreed to reduce its prices on existing contracts by a total of \$40,000,000. A third such meeting, on April 6th, with the Sperry Corporation resulted in a voluntary reduction of about \$100,000,000.

26. Other voluntary renegotiations were effected in the first quarter of 1942. A number of contractors expressed their willingness to adjust their prices to reflect actual costs, as they developed, and to restrict their profits to proper wartime levels.

(a) Prior to May, 1942, General Motors Corporation had made voluntary price reductions running into more than \$200,000,000, according to its own figures. One example follows: In a contract made in August 1941 for 8,000 aircraft engines, the Allison Division of General Motors included contingency reserves in the unit prices but stated that if excessive profits developed during the course of performance it would be willing to grant reductions on undelivered engines. In December 1941 and January 1942, the War Department received information that costs were lower than anticipated. Renegotiation discussions were begun with the contractor, and on March 30, 1942, it offered to refund approximately \$20,000,000 to the Government.

(b) In June 1941, Republic Aviation Corporation undertook to manufacture 125 P-43A airplanes,

over a period of some ten months, at a stated unit price. The Government's negotiators believed that the agreed price might lead to excessive profits. The contractor's representatives, though believing that the price was not too high, orally agreed that if profits in excess of 10 or 11 per cent were made, the company would either voluntarily reduce its contract price or would construct an experimental plane for the Government without cost. On December 10, 1941, the contractor informed the Government that its profit on the contract would probably exceed the stipulated amount and suggested that it furnish the experimental airplane. The War Department was not interested in the experimental airplane, and after further cost figures indicating excessive profits became available, the contractor offered an acceptable voluntary price reduction of \$1,445,370.00.

(c) In April 1942, information became available that Beech Aircraft Corporation was making a profit of approximately 33% on its airplane contracts. On April 16th and 17th the Company agreed to review the contract prices, and shortly thereafter price reduction agreements were consummated.

(d) Similarly, in April 1942 discussions were begun with Cessna Aircraft Corporation, Bendix Aviation Corporation, and some other contractors, which resulted in price reductions.

27. In March 1942, the War Department determined to establish formal price renegotiation machinery, and plans were drawn for a Price Adjustment Board to negotiate with contractors for reduced prices where excessive profits had been or

were likely to be secured. On March 27, 1942, there was prepared in the War Department a tentative memorandum outlining the policy and procedure of the putative War Department Price Adjustment Board. The purpose of the Board, its operating policies, and method of operations were set forth, as well as a list of factors to be considered in determining the reasonableness of profits. A copy of this memorandum is attached as Exhibit E. To be noted is the similarity between the factors listed as governing profit reasonableness in this memorandum, in the Joint Statement by the War, Navy, and Treasury Departments and the Maritime Commission, dated March 1943, and in the Renegotiation Act, as amended and reenacted in the Revenue Act of 1943. This memorandum of March 27th was not published nor was it issued officially, but use was made of it in voluntary renegotiations conducted by the War Department. At the meeting of March 28th with Continental Motors Corporation (see paragraph 25 above) this memorandum was read to the contractor's representatives as a preliminary and tentative statement of War Department policy on excessive profits.

28. Title XIII of the Second War Powers Act, enacted March 27, 1942, conferred upon the Government authority to inspect the plants, books, and records of war contractors. On April 10th, the President issued Executive Order 9127 ("Designating the Departments and Agencies to Inspect the Plants and Audit the Books and Records of Defense Contractors under Title XIII of the Second War

Powers Act, 1942'') in order "to prevent the accumulation of unreasonable profits, to avoid waste of Government funds, and to implement other measures which have been undertaken to forestall price rises and inflation." Under this order, the cost analysis units in the War Department were expanded and strengthened, and a new basis was laid for price adjustment boards.

29. The Under Secretary of War, the Under Secretary of the Navy and the Chairman of the Maritime Commission (with the approval of the Chairman of the War Production Board) agreed to establish price adjustment boards within the three agencies in order to advise and assist procurement officials "in securing adjustments or refunds in instances where it is determined that costs or profits of contractors are, or may be, excessive for any reason." A copy of this memorandum is attached as Exhibit F. Plans for such a board in the War Department had been proceeding meanwhile and on April 25th, Lieutenant General Brehon Somervell, Commanding General of the Services of Supply, formally established such a price adjustment board, with my approval. A copy of his memorandum is attached as Exhibit G.

30. A corollary to the establishment of these procedures for voluntary renegotiation, without specific contractual or statutory basis, was the development of contract clauses looking toward the renegotiation or redetermination of prices after partial or complete performance. The problem was submitted to

a committee of representatives of the War Production Board, the War Department and the Navy Department and resulted in the preparation of two contract clauses. One, known as the "redetermination clause," was designed to permit automatic adjustment downward in price on the basis of actual cost experience during a "test run" early in the performance of the contract. The other contract provision, originally known as the "renegotiation clause," was designed to permit adjustment of the price either upward or downward in the light of actual cost experience after part performance, as soon as reasonable reliable cost estimates were feasible. These articles were promulgated for use in War Department contracts by P. B. General Directive No. 31 dated March 13, 1942, a copy of which is attached as Exhibit H. One of the purposes of the new clauses can be gained from the opening statement of the directive that "It is essential to eliminate all delays in the production of items immediately required which result from the time required for the negotiation of fixed price contracts."

Statutory Proposals

31. The Congress was, of course, also concerned with the probability that excessive profits would be made by many war contractors, despite the excess profits tax. The disclosures at committee hearings and the profit information available was thought to require legislative action. In March 1942, a bill was introduced to establish a rigid profit limitation of 6% on war contracts. On behalf of the War De-

partment, I opposed this proposal before the Committee on Naval Affairs of the House of Representatives (March 19, 1942), and Mr. Donald Nelson opposed it on behalf of the War Production Board (March 24, 1942). (Hearings before the Committee on Naval Affairs, House of Representatives, 77th Cong., 2d Session, on H. R. 6790, pp. 2473-2475, 2577-2578.) Mr. Nelson and I pointed out that the bill, if enacted, was likely to interfere with war production, especially by delaying the conversion of small business to war work and also by forcing the increased use of the cumbersome and wasteful cost-plus-fixed-fee contract. We also pointed out that a fair percentage of profit was not solely a function of the cost of performance but depended upon such factors as turn-over, volume of business, amount of invested capital, financial structure, time of performance, and contribution to increased efficiency. Depending upon these factors, and particularly upon dollar volume of business, a 6% profit might be far too large or far too small. Attention was also called to the impossibility, under the flat percentage system, of allowing the recoupment of losses. At the same time, I stressed to the Committee that the War Department recognized its "plain duty to take every practicable step to prevent contractors from obtaining excessive and unconscionable profits," and I described the cost analysis and price adjustment projects which were then being formulated (see pars. 27-29 above), and the price redetermination and revision clauses which had been authorized (see par. 30 above). This profit limitation

bill, to which I expressed the War Department's opposition, was not acted upon by the House of Representatives.

32. On March 28, 1942, Congressman Case offered on the floor of the House of Representatives two profit-limitation amendments to the Sixth Supplemental National Defense Appropriation Bill. His first proposal was that no final payment on a war contract be made by the Government "until the contractor shall have filed with the procuring agency a certificate of costs and an agreement for renegotiation and reimbursement satisfactory to the Secretary of War or the Secretary of the Navy, as the case may be." This amendment was subject to a point of order, and Congressman Case then offered a substitute amendment providing that final payment was not to be made "to any contractor who fails to file with the procuring agency a certificate of cost and an agreement for renegotiation of contract and reimbursement of profits in excess of 6 per cent." This amendment was adopted by the House of Representatives without debate. Mr. Case has stated that his proposals were modeled, in part, upon the renegotiation clauses developed by the procurement agencies (see par. 30 above). See Hearings before the Subcommittee of the Committee on Appropriations, U. S. Senate, 77th Cong., 2nd Sess. on H. R. 6868, pp. 89-92, 211-2.

33. At a hearing held on March 31 and April 1, 1942, by a subcommittee of the Senate Committee on Appropriations, on the Sixth Supplemental National Defense Appropriations Bill for 1942, represent-

atives of the Government stated the objections to the Case amendment, as it then stood. General Somervell reviewed the factors making adequate pricing impossible in many cases and described the price adjustment procedures which had already been established in the War Department. The committee was informed that a Cost Analysis Section and a Price Adjustment Board had been set up and were at work and tentative policies and procedures had been laid down (Hearings pp. 24-25). The approved "redetermination" and "renegotiation" contract articles were also described to this subcommittee and their use explained. General Somervell, Mr. Donald Nelson of the War Production Board, and other representatives of the procurement agencies again stated the objections to an inelastic profit-limitation provision of the type of the Case amendment. It was pointed out that the amount and rate of profit should depend—out of fairness to contractors and to furnish the proper incentive to reduce costs—on a number of factors such as rapidity of turn-over, development costs, production time, money invested in the business, risks incurred, efficiency of production; a flat percentage limitation lumping all contractors together would not only be unfair to many and too generous to others but is subject to the very defects which have placed the cost-plus contract in disfavor; moreover, the statutory percentage of profit which is intended to be a maximum tends to become a minimum and contractors believe that they are entitled to receive that rate of profit.

34. The Senate Subcommittee requested the procurement agencies to supply a substitute for the Case amendment. On April 2, 1942, General Somervell submitted a proposal on behalf of the War and Navy Departments and the War Production Board. A copy of this substitute proposal is attached as Exhibit I. The suggestion was based on the theory that if every contract price could be reexamined by the parties in the light of actual experience under the contract, it should be possible to eliminate the bulk of excessive profits. Section 403, as finally enacted, differs in many respects from our proposal, but it retains the central principle that a fixed percentage limitation on profits should not be established.

35. The War Department has consistently opposed the substitution of a 100% excess profits tax in place of the renegotiation statute, for the same reasons for which we disapproved a flat percentage limitation on profits from war contracts. Our views are stated at length in the report of the Hearings before a Subcommittee of the Senate Committee on Finance on Section 403 of Public Law No. 528, September 29-30, 1942, 77th Congress, 2d Session, and the Hearings before the Committee on Naval Affairs, House of Representatives, pursuant to H. Res. 30, June 1943, 78th Cong., 1st Sess. pp. 997-1000. The Introductions to the Renegotiation Regulations of the War Contracts Price Adjustment Board and to the Joint Renegotiation Manual approved by the Joint Price Adjustment Board also contain statements on this point with which the War Department

is in accord. In brief, the major objection to a 100% excess profits tax is that it would remove all incentive to reduce costs or promote efficiency, and in this respect would tend to increase the cost of war procurement through the waste of manpower and resources so as to counterbalance any gain in tax collections.

36. The War Department has found that the Renegotiation Act is the most satisfactory and effective method of eliminating excess profits on war contracts. The Department has vigorously opposed the repeal of the statute.

Contracts on Which Final Payment Had Not Been Made on April 28, 1942

37. At the end of April 1942, the following amounts were obligated for contracts, but unexpended, by the Navy Department and the three major procurement services of the War Department:

Army Air Forces contracts, over.....	\$16,700,000,000
Ordnance Department contracts, over	10,000,000,000
Engineers contracts, over	4,000,000,000
Navy contracts, over	18,000,000,000
<hr/>	
Total, over.....	\$48,700,000,000

These figures concern only the agencies listed; they do not include subcontracts; nor do they include sums actually paid prior to April 28, 1942, on contracts on which final payment was not made until after that date. The figures do, however, include sums owing on some contracts exempt from renegotiation.

tiation under the statute, but such sums are relatively small.

38. On the whole, it is certain that, on April 28, 1942, there were outstanding uncompleted war contracts in a total figure considerably in excess of 50 billion dollars which would have been exempt from renegotiation if the statute had not been made applicable to contracts existing on April 28th but with respect to which final payment had not been made by that date.

39. It is impossible to give more than the most general data concerning the life of the uncompleted contracts in existence on April 28, 1942. The average time required for the construction of the major types of projects (cantonments, airfields, ordnance plants) being constructed under the supervision of the Corps of Engineers in April 1942 was from 7 to 18 months. A substantial proportion of the Ordnance contracts placed during the first four months of 1942 extended for over six months; some of these contracts contemplated production extending over a period as long as two years. The Navy Department estimates that at least one-third of its funds which were obligated but unexpended on April 30, 1942, represented contracts requiring 12 months or longer for performance.

Excessive Profits Eliminated by Renegotiation

40. As of September 19, 1944, 34,966 contractors had been assigned for renegotiation with respect to fiscal years ending during the calendar year 1942. As of the same date, 35,200 contractors had been

assigned for such renegotiation with respect to fiscal years ending during the calendar year 1943. Of the cases assigned with respect to fiscal years ending in the calendar year 1942, relatively few remain uncompleted; and the renegotiation agencies are well along toward completion of the cases assigned with respect to fiscal years ending in the calendar year 1943.

41. As of September 22, 1944, in 7,949 cases excessive profits had been determined by agreement between the contractor and the Government, and at that date in 207 cases excessive profits had been determined by unilateral action by the Government without the agreement of the contractor. Thus, 97.5% of the cases in which excessive profits had been determined involved bilateral agreements in which the contractor joined. These figures do not include the cases, of which there are a large number, in which no excessive profits were found or in which the renegotiation proceedings were cancelled as the result of information indicating no excessive profits. It should be noted, too, that the number of contractors affected by the bilateral agreements exceeds the number of 7,949, since many of these agreements affect groups of parent and subsidiary corporations.

42. It is impossible at the present time to give complete figures as to the dollar volume of the sales covered by the cases in which excessive profits have been determined. As of September 16, 1944, in the 7,733 cases concluded by bilateral agreement or unilateral determination (excluding Army construction contracts), the aggregate renegotiable sales of the

contractors affected (prior to adjustment for excessive profits eliminated) were \$30,975,405,000. Excessive profits eliminated in these cases amounted to \$3,586,652,000. In addition, approximately \$57,000,000 in excessive profits had been recovered from construction contractors assigned to the Chief of Engineers for renegotiation. These figures do not take account of reductions in Federal taxes occasioned by the elimination of excessive profits through renegotiation.

43. The figures in the preceding paragraph do not include excessive profits eliminated (a) by refunds made to contracting officers prior to and unrelated to statutory renegotiation, (b) by reduced prices with respect to future performance or deliveries under existing contracts, or (c) by reduced prices under new contracts. No statistical data are available as to the amounts of excessive profits so eliminated or prevented, but they have been substantial, and run into many hundred millions of dollars.

44. The data contained in paragraphs 40 to 43 cover renegotiations carried on by all agencies and not merely those in which the War Department is interested.

Renegotiation Procedure

45. From the very beginning of statutory renegotiation by the War Department, the attempt has always been made to secure the full cooperation of the contractor in the process of renegotiation. It has been the uniform practice to explain the purposes, policies and methods of renegotiation to con-

tractors and to elicit their participation both in the furnishing of information and in the drawing up of an agreement as to excessive profits. Although Title XIII of the Second War Powers Act, 1942, grants the Government certain powers to secure the pertinent records and data, on which renegotiation must be based, from recalcitrant contractors, we have always sought to obtain this information voluntarily, and without unduly hampering the contractor's activities. Similarly although the statute empowers the renegotiation agencies to determine excessive profits unilaterally, it has always been our policy to renegotiate, in the literal sense, and to seek a bilateral agreement with the contractor, whenever possible.

46. In most cases, renegotiation in the War Department (for fiscal years ending on or prior to June 30, 1943) was conducted initially by price adjustment sections of the supply services (e. g. Ordnance Department, Signal Corps, Chemical Warfare Service) and the Army Air Forces. If in the initial renegotiation the price adjustment section handling the cases reached an understanding with the contractor, a bilateral agreement was executed, both by the Government and by the contractor. If, however, the initial renegotiation proceedings did not result in an agreement with the contractor and an impasse was reached, the case was always referred to the War Department Price Adjustment Board. That Board, in the handling of impasse cases, was empowered to hold further meetings or discussions with the contractor. I am advised that

the War Department Price Adjustment Board, in every case in which a contractor requested a meeting with representatives of that Board, accorded the contractor the opportunity of such a meeting. If an agreement could not be reached between the representatives of the Board and the contractor in a case in which it was believed that excessive profits had been realized, the case was then referred, together with a full report, to me as Under Secretary of War. It has been my practice to refer such cases, for initial review, to one of my principal assistants, not otherwise connected with renegotiation. This assistant has invariably allowed the contractor, upon the latter's request, to meet with him before he made any recommendation that a determination of excessive profits should be made by me; and in this meeting the contractor could present any pertinent material not previously furnished and discuss the matter from the contractor's point of view. I have personally made the final determination that excessive profits have been made, and the amount of such excess, in every case in which a unilateral determination has been issued. In sum, opportunity is always afforded the contractor for discussions with representatives of the renegotiating agency and the presentation of pertinent data and argument. No unilateral determination has ever been made without the contractor's having been offered the opportunity, at some stage and in substantially all cases in several stages in the renegotiation process, to present his views and discuss the matter.

ROBERT P. PATTERSON.

Sworn to and subscribed before me this 16th day of December, 1944.

[Seal]

ANNA C. LANIGAN

Notary Public, D. C.

My Commission Expires June 15, 1946.

EXHIBIT A

W. P. B. Record of Monthly Awards of Prime War Supply Contracts

Date	Number of Contracts				
	Total	Aircraft	Ships	Ordnance	All Others
1941					
July	1,124	40	40	202	842
August	1,352	62	77	264	949
September	1,476	78	68	223	1,107
October	1,824	97	49	305	1,373
November	1,566	94	67	321	1,084
December	1,885	116	63	384	1,322
1942					
January	3,612	132	156	836	2,488
February	3,656	136	165	710	2,645
March	4,188	162	161	765	3,100
April	4,866	187	197	795	3,687
May	3,597	114	126	459	2,898
June	3,657	143	171	439	2,904

Date	Total	Value (Millions of Dollars)			
		Aircraft	Ships	Ordnance	All Others
1941					
July	1,057	92	129	551	285
August	1,842	688	237	636	281
September	1,335	386	159	436	353
October	2,404	1,264	107	569	464
November	1,506	261	288	461	495
December	3,131	985	406	1,150	589
1942					
January	9,456	2,435	2,092	4,015	914
February	7,301	3,628	893	1,891	889
March	5,343	1,440	728	1,842	1,333
April	5,715	1,234	1,014	1,808	1,659
May	4,843	1,337	759	1,530	1,216
June	5,299	937	1,249	1,709	1,404

EXHIBIT B

War Department
Office of the Under Secretary
Washington, D. C.

January 14, 1942.

PC-E-400.13 (Procurement).

P. & C. General Directive No. 8.

Memorandum for:

The Chief of the Air Corps.

The Chief, Chemical Warfare Service.

The Chief of Coast Artillery.

The Chief of Engineers.

The Chief, National Guard Bureau.

The Chief of Ordnance.

The Quartermaster General.

The Chief Signal Officer.

The Surgeon General.

Subject: Selection of contractors for war production.

1. The heavy procurement program and need for speed in production make vital the best utilization of every facility. As a limited number of facilities are able to undertake precision work, care must be exercised in allocating only such work to them, each plant to undertake the highest caliber of work its equipment can produce.

2. In awarding prime contracts, great weight must be placed upon the contractor's agreement to subcontract a high percentage wherever this is feasi-

ble. Unless secondary facilities are thus put to work on the simpler components, difficulty will later be encountered in placing prime contracts calling for precision work. The best results will be obtained by insisting upon such subcontracting at the time of the award of the prime contract as efforts to have prime contractors subcontract simpler components at a later date may be only partially successful after work has been started.

3. In many cases requirement of subcontracting will add to the total cost. Price is a secondary consideration as compared with speed and efficient production. Reasonable increase in price which will speed the program through subcontracting is justified. Because of the increase in price, subcontracting should be taken into account in making the award and should be provided for in the prime contract, where possible, rather than to assume that it can be arranged after the award has been made.

4. Speed in placing orders now authorized is important, but speed of production as a whole during the next 18 months is of even greater importance. Accordingly, under our present decentralized procurement policy the chiefs of the supply arms and services and their district procurement offices must exercise their best judgment in the matters mentioned in paragraphs 1, 2 and 3 above. War calls for the same boldness and imagination in procurement as it does in meeting combat conditions in the field.

By direction of the Under Secretary of War:

(s) JOHN W. N. SCHULZ,

Brigadier General, U. S. Army,
Director of Purchases and Con-
tracts. [91]

EXHIBIT C

War Department
Office of the Under Secretary
Washington, D. C.

September 17, 1941.

PC-L 162 (Escalator Clause).

P. & C. General Directive No. 48.

Memorandum for

The Chief of the Air Corps.

The Chief, Chemical Warfare Service.

The Chief of Coast Artillery.

The Chief of Engineers.

The Chief, National Guard Bureau.

The Chief of Ordnance.

The Quartermaster General.

The Chief Signal Officer.

The Surgeon General.

Subject: Price Adjustment Clause

1. Price Adjustment articles (escalator clauses) will be included in supply contracts only in exceptional cases where the facts justify their use. In determining the justification for the inclusion of

such a clause, the following factors, among others, should be given consideration:

(a) The inclusion of an escalator clause should result in a lower contract price than if such a clause were not included. Before consenting to the inclusion of an escalator clause in a contract, the contracting officer should satisfy himself that the contractor has not included in the contract price any amount to cover probable increased direct labor or direct materials costs.

(b) The time required for the performance of the contract should be such as to make it impossible [92] to forecast with reasonable accuracy the extent of changes in the direct labor or direct materials cost under the contract. Ordinarily the time of performance should not be less than six (6) months.

(c) The contract should be of sufficient amount to warrant the administrative expenses which would be incurred in administering the escalator clause. As a general rule, contracts for less than \$100,000 would not warrant such expenditure.

2. Attached hereto are copies of the Price Adjustment article (escalator clause) as approved by the Under Secretary of War on September 13, 1941, for use in supply contracts hereafter entered into where it has been determined that an escalator clause should be included. Any deviations from this form will be made only after approval in each case by the Under Secretary of War. Requests for such approval will be accompanied by a detailed

statement of the facts and reasons justifying such deviation.

3. All contracts containing this escalator clause will also contain an article providing for termination of the contract for the convenience of the Government.

4. It is desired that the foregoing instructions be communicated promptly to all contracting agencies in your branch.

By direction of the Under Secretary of War:

(s) JOHN W. N. SCHULZ,

Brigadier General, U. S. Army,
Director of Purchases and Con-
tracts.

Incls.

cys. Price Adjustment Clause. [93]

**FORM OF ESCALATOR CLAUSE APPROVED
BY THE UNDER SECRETARY OF WAR,
SEPTEMBER 13, 1941**

Article..... Price Adjustments.

The total contract price stated in Article.....
is subject to adjustment for increases or decreases
in direct labor and direct material costs in accord-
ance with the following method:

(a) Labor.

(1) Upon the basis of labor costs prevailing in
....., 194.. (hereinafter called the base
month) the direct labor cost is estimated to be
\$..... Direct labor, as used herein,

refers only to the labor of employees of the Contractor performed directly on, and properly chargeable to, the supplies manufactured hereunder, excluding but without limitation, all executive, managerial, supervisory, technical, professional, office, clerical and sales employees, but including working foremen, gang-bosses and strawbosses. The Contractor represents that the above estimated cost is based upon a schedule, approved by the Contracting Officer, of the kinds or classes of jobs or occupations to be charged as direct labor under this contract, and that the estimate includes only such jobs or occupations. In computing the actual direct labor cost for the purposes of paragraph (a) (2) and (a) (3) hereof, the cost of kinds or classes of jobs or occupations not listed in this schedule, a copy of which is attached hereto, shall not be included.

(2) After deliveries under this contract have been completed, the estimated direct labor cost set forth above shall be apportioned into direct labor cost quotas for the consecutive three-month periods (hereinafter called "quota periods") beginning on the first [94] day of, 194.,¹ and on the first day of each third month thereafter. This apportionment shall be made by dividing the actual direct labor cost properly charged to this contract during each quota period by the total

¹The month during which the contract is executed or performance is commenced, whichever is earlier.

actual direct labor cost under the contract, and by multiplying the percentage thus obtained for each quota period by the total estimated direct labor cost. The result shall be the direct labor cost quota for that period.

(3) Upon the basis of the average hourly earnings in the durable goods manufacturing industries compiled by the United States Department of Labor, Bureau of Labor Statistics, the Government will determine the average hourly earning for each quota period by adding the average hourly earnings for each month of such quota period and dividing their sum by three, and calculations will be made of the percentage of change of such average hourly earnings for each quota period in comparison with the average hourly earnings for the base month. The labor cost quota for each quota period will then be multiplied by the percentage of change for such quota period, and the result will be applied as an increase or decrease in the contract price; Provided, That the total of such increases in the contract price shall not exceed the amount by which the total actual direct labor cost exceeds the total estimated direct labor cost, and that the total of such decreases in the contract price shall not exceed the amount by which the total actual direct labor cost is less than the total estimated direct labor cost.

(b) Materials. [95]

(1) Upon the basis of materials costs prevailing in the base month, the cost of direct materials

which the Contractor will purchase for the performance of this contract, excluding materials to be used which the Contractor has on hand or for which firm price commitments have been obtained by him (hereinafter call "direct materials to be purchased hereunder"), is estimated to be \$..... (hereinafter called "estimated adjustable materials cost"). Direct materials as used herein refers only to those materials which go into and become a component part of the Contractor's finished product and which, under the cost accounting system regularly employed in the Contractor's plant, are accounted for by direct charges to the particular contract. The Contractor represents that the above estimate is based upon a schedule, approved by the Contracting Officer, of the kinds and classes of "direct materials to be purchased hereunder." In computing the actual cost of "direct materials to be purchased hereunder" for the purposes of paragraphs (b) (2) and (b) (3) hereof, the cost of kinds or classes of materials not listed in this schedule, a copy of which is attached hereto, shall not be included.

(2) After deliveries under this contract have been completed, the "estimated adjustable materials cost" shall be apportioned into materials cost quotas for the quota periods as defined in paragraph (a) (2) above. This apportionment shall be made by dividing the total actual cost of "direct materials to be purchased hereunder" into the portion of such cost properly charged to the contract

during each quota period, and by multiplying the percentage thus obtained for each quota period, by the total "estimated adjustable materials cost." The result shall be the materials cost quota for that period. Direct materials shall be [96] charged to the contract for the quota period during which the price therefor is determined as between the Contractor and the materials supplier; Provided, That where commitments are obtained by the Contractor for future deliveries at a firm price in excess of the market price prevailing at the time such commitments were obtained, such materials shall be charged to the contract for the quota period during which delivery is to be received by the Contractor; And, Provided further, That with respect to materials which are not identifiable with the purchase commitments under which they are acquired, determinations as to (1) whether the materials employed in the performance of this contract were on hand at the time the contract was executed, and (2) the quota period to which the materials are to be charged and the amount of such charge shall, with the approval of the Contracting Officer, be made on the basis of the accounting system regularly employed in the Contractor's plant.

(3) The Government will average for each quota period the index numbers of wholesale prices for² compiled by the United States

²The index for the commodities group which includes the items making up the major portion of the "direct materials to be purchased hereunder."

Department of Labor, Bureau of Labor Statistics for the three months included within such quota period, and calculations will be made of the percentage of change of such average index numbers for each quota period in comparison with the index numbers for the base month. The materials cost quota for each quota period shall then be multiplied by the percentage of change for such quota period, and the result will be applied as an increase or decrease in the contract price; Provided, That the total of such increases in [97] the contract price shall not exceed the amount by which the actual cost of "direct materials to be purchased hereunder" exceeds the total "estimated adjustable materials cost," and that the total of such decreases in the contract price shall not exceed the amount by which said total actual cost of "direct materials to be purchased hereunder" is less than the total "estimated adjustable materials cost."

(c) General.

(1) For the purpose of determining increases or decreases in contract prices, rates of change in average hourly earnings and rates of change in the materials index number will be calculated to the nearest one-tenth of one per cent, and there shall be used the latest figures which shall have been issued by the Bureau of Labor Statistics up to the close of the fourth month following the last quota period under this contract.

(2) Payments for increases, or deductions for decreases in the contract price, resulting from the operation of this article, will be made after the

completion of the calculations of price adjustments in accordance herewith; Provided, That the Government may, from time to time during the life of the contract, make partial payments on account of such increases, subject to such requirements as a condition precedent to such payments as the Contracting Officer may provide; Provided, further, That in this event such partial payments shall exceed the amount due to the Contractor by the operation of this article, the Government shall deduct the amount of such excess from any further payments due under this contract.

(3) Should the Contractor, during the performance of this contract, on account of subcontracting, or otherwise, depart from the production methods upon which the estimates and schedules of direct labor and direct [98] materials costs were based to such an extent that the use of such estimates or schedules will operate to produce an unfair adjustment of the contract price, a corresponding correction in such estimates or schedules may be made by mutual agreement between the Contractor and the Contracting Officer. In the event of disagreement with respect to the need for or extent of such correction, the procedure of Article 12 (Disputes) shall apply.

(4) If this contract is terminated pursuant to any provision thereof the contract price shall be adjusted as provided above, except that for the purposes of paragraphs (a) (2), (a) (3), (b) (2), and (b) (3), the terms "estimated direct labor

cost” and “estimated adjustable materials cost” shall be understood to refer to that part of such costs which corresponds to that proportion of the supplies contracted for which is completed and delivered by the Contractor, and the terms “actual direct labor cost” and “actual cost of direct materials to be purchased hereunder,” shall refer only to that part of such costs which is properly chargeable to the supplies completed and delivered.

(5) The Contractor shall file with the Contracting Officer, not later than sixty days after the completion of the performance of the work under this contract or after its termination, a statement of the actual direct labor costs and the actual costs of “direct materials to be purchased hereunder,” certified as correct by an independent public accountant approved by the Contracting Officer, showing the amounts of such costs properly chargeable during each quota period and, in case of termination, the amounts properly chargeable to the supplies completed and delivered. In determining the total actual direct labor cost and the total [99] actual “direct materials to be purchased hereunder,” and in determining the amounts thereof to be charged in each quota period, the Contractor may, subject to the approval of the Contracting Officer and to the limitations of paragraph (b) (2), employ the accounting system regularly employed in the Contractor’s plant. Such statement shall be deemed prima facie correct. The Government reserves the right to audit the books and records of

the Contractor, to determine the accuracy of such determinations and certification, and to obtain any information in connection with the operation of this Article. All information obtained from the Contractor's records shall be treated as confidential. The Contractor shall preserve all the books, papers, and other accounting records pertaining thereto; Provided, that if the Contractor at any time after the lapse of three years following the completion or cessation of work under the contract, desires to dispose of said books, papers, and accounting records, he shall so notify the Secretary of War, or his duly authorized representative, who shall either authorize their destruction or notify the Contractor to turn them over to the Government for disposition. [100]

EXHIBIT D

War Department
Office of the Under Secretary
Washington, D. C.

PC-L 162.

December 17, 1941.

P. & C. General Directive No. 86.

Memorandum for:

The Chief of the Air Corps.

The Chief, Chemical Warfare Service.

The Chief of Coast Artillery.

The Chief of Engineers.

The Chief, National Guard Bureau.

The Chief of Ordnance.

The Quartermaster General.

The Chief Signal Officer.

The Surgeon General.

Copy to:

The Judge Advocate General—for information.

Subject: Amendment to Price Adjustment Clause.

1. Reference is made to the form of escalator clause approved by the Under Secretary of War on September 13, 1941, accompanying P. & C. General Directive No. 48.

2. It has been determined that the escalator clause should be amended so as to provide for adjustments on account of changes in pay-roll taxes, and therefore, the approved form of escalator clause will be amended by adding the following provision thereto as paragraph (c) (6):

“If after the date on which the prices herein were quoted, the Congress or any state legislature, shall impose, remove, increase or decrease any pay-roll tax required to be borne by the [101] contractor and directly applicable to or measured by the pay-rolls of the contractor hereunder, then the rate of such newly imposed tax, or the net increase or net decrease in the rate of a previously imposed tax, shall be multiplied by that portion of the actual direct labor cost which is subject to such increases or decreases in the tax or taxes, and the result shall be paid the contractor under this paragraph.”

3. It has also been determined that the escalator clause should be amended so as to provide for adjustment on account of changes in indirect labor

and indirect material costs. Accordingly, the following amendments to the approved form of escalator clause will be made:

(a) As a second sentence to Paragraph (a) (1), add the following:

“It is also estimated that the indirect labor cost attributable to this contract is.....% of such estimated direct labor cost.”

(b) Add the following as Paragraph (a) (4):

“The total increase or decrease to be paid or deducted under Paragraph (a) (3) shall be multiplied by.....%¹ and the result shall be applied as a further increase or decrease in the contract price, as an adjustment for the indirect labor cost under this contract.”

(c) Add the following as the second sentence in Paragraph (b) (1):

“It is also estimated that the indirect materials cost attributable to this contract is.....% of such estimated direct materials cost.”

(d) Add the following as Paragraph (b) (4):

“The total increase or decrease to be paid or deducted under Paragraph (b) (3) shall be [102] multiplied by.....%² and the result shall be applied as a further increase or decrease in the contract price, as an adjustment for the indirect materials cost under this contract.”

¹The percentage of indirect labor cost stated in Paragraph (a) (1).

²The percentage of indirect materials cost stated in Paragraph (b) (1).

4. In negotiating the estimated direct labor cost, the percentage thereof represented by indirect labor cost, the estimated direct material cost, and the percentage thereof represented by indirect material cost, the Contracting Officer should consider, among other things, the following factors:

(a) The amount of the estimated direct labor cost and the amount of the estimated direct materials cost should be limited in accordance with the definitions of direct labor and direct material costs contained in paragraphs (a) (1) and (b) (1) of the escalator clause, and should not include any amounts for indirect labor or indirect material costs;

(b) The total of the estimated direct labor cost and the estimated direct material cost, together with the amounts obtained by the application of the percentages set forth for indirect labor and indirect materials, should bear a reasonable relation to the total contract price. In any case where the difference between the total of these amounts and the contract price does not leave a reasonable margin to cover profit, rent, depreciation, taxes, and similar costs not included in the labor or material costs factors, it will be apparent that the estimates are too high, and should be accordingly reduced.

By direction of the Under Secretary of War:

(s) JOHN W. N. SCHULZ,
Brigadier General, U. S. Army,
Director of Purchases and Con-
tracts. [103]

EXHIBIT E

War Department Price Adjustment Board

POLICY AND PROCEDURE

Purpose of the Board

The Price Adjustment Board will serve as a focal point for the review of contracts existing between the War Department and its contractors. Its duties will be to make sure that the War Department is doing an economical job of purchasing and that contractors are not making excess or unreasonable profits on war orders. In its review of contractor profits the Board will endeavor to eliminate from contractor cost calculations exorbitant items of whatever nature.

The Board will assist the Services in securing an adjustment in contract prices that will accomplish the foregoing objectives.

The Board will also serve contractors who feel that their contract prices are such that a likelihood exists that they will make excessive or unreasonable profits. It will invite war contractors finding themselves in this position to consult with it for the purpose of arriving at a fair and equitable voluntary adjustment.

Operating Policies.

The following principles will be observed by the Price Adjustment Board in dealings with contractors:

1. The Board will endeavor to arrange for a readjustment in contract price or to obtain a return

of payments made pursuant to a contract to the extent which will result in limiting the contractor to a fair and reasonable profit.

2. In judging the reasonableness of profit, the Board will consider: [104]

(a) the total profit made by the contractor before allowance for federal income and excess profit tax.

(b) the amount of profit per unit based on estimated or actual cost.

3. In determining the estimated or actual cost per unit of performance of the contract, the Board will give consideration to all items of cost, including the following:

A. Factory Cost:

1. Direct materials
2. Direct productive labor
3. Direct engineering labor
4. Miscellaneous direct factory charges
5. Indirect factory expenses

Total Factory Cost

B. Other manufacturing cost

C. Miscellaneous direct expenses

D. Indirect engineering expenses

E. Expenses of distribution, servicing and administration

F. Guarantee expenses

4. The Board will in general be guided by the cost accounting system regularly utilized by the contractor, except that the Board will, in appropriate cases, disallow salaries, bonuses or other expenditures which are clearly excessive.

5. In determining the amount of profit to be viewed as reasonable, the Board will give proper consideration the following:

A. The first factor in determining the attitude of the Board toward the contractor will be based on the contribution that the contractor has made [105] and is making to the completion of the war production program.

B. Whether the contract is performed in whole or in part with facilities furnished by or financed by the Government.

C. The amount of invested capital employed by the contractor in the performance of the contract.

D. The ratio between this investment and sales volume.

E. The period of time required to perform the contract.

F. The complexity or simplicity of the manufacturing operations involved.

G. The presence or absence of exceptional risks to be borne by the company.

H. The degree of skill and management and organization required of the contractor. In this connection special attention will be paid to the extent to which the Government has been called upon to arrange for furnishing "know-how" to the contractor.

I. The contribution that the contractor has made to the technical improvement and development of war materiel and production methods.

J. Special consideration will be given those

contractors who have assisted other producers in performing a better job.

6. In cases where performance has been substantially or wholly completed, consideration will be given to the extent to which the contractor has met or anticipated delivery schedules.

7. The Board shall not be limited to the foregoing factors but may give consideration to any other factors which in its judgment are reasonably applicable [106]

Method of Operation.

Information as to concerns making unreasonable profits or those paying excessive salaries or bonuses, or setting up excessive reserves, etc., will be obtained by the Board from the services, Division of Budget & Financial Administration, Contract Clearance Branch of the War Production Board, or any other sources.

All costs analyses are to be prepared by the Division of Budget and Financial Administration.

When the contractor is working for the Navy or the Maritime Commission as well as the Army, that department which has been assigned to the contractor will take charge of the case.

The Price Adjustment Board function will be completed when an agreement is arrived at with the contractor setting a limiting figure that shall be considered a reasonable profit before federal income and excess profit taxes. From this point forward, it is contemplated that the contractor will renegotiate contracts with the Service or Services

involved so as to bring its total profit down to the agreed upon figure.

EXHIBIT F

MEMORANDUM

Pursuant to Executive Order No. 9127, dated April 8, 1942, and for the purpose of controlling profits and costs under war contracts through adjustments with contractors, there have been established with the War Production Board, the War Department, the Navy Department and the Maritime Commission cost analysis sections. Further to implement control of costs and profits on war contracts, the following procedures will be established:

1. The War Department and the Navy Department and the Maritime Commission will each [107] create a board to be known as the Price Adjustment Board of the War Department, the Navy Department, or the Maritime Commission, as the case may be, to advise and assist the official in such Department or Commission in charge of purchasing, in securing adjustments or refunds in instances where it is determined that costs or profits of contractors are, or may be, excessive for any reason. Each board shall exercise such other powers not inconsistent with this order as may be delegated to it by the Department or Commission which created it.

2. The Chairman of the War Production Board shall recommend a representative for appointment to each board. The Price Adjustment Boards may have one or more members in common.

3. The Cost Analysis Section of the War Production Board will conduct general surveys of the profits and costs of holders of war contracts and industry-wide studies of a like nature, either upon the request of one of the Price Adjustment Boards, or of the Cost Analysis Section of any Department, or upon its own initiative.

4. The Cost Analysis Sections of the War Department, Navy Department and the Maritime Commission will act as fact finding agencies for the Price Adjustment Boards and will upon the request of any Price Adjustment Board conduct investigations into the cost and profits of any contracts in which Departments or the Commission are interested. Any such investigation made upon the request of a Price Adjustment Board will be in such form and in such detail and will include such subject matter as such Price Adjustment Board may require. The Departments and the Commission will cooperate with each other in [108] order to avoid duplicating investigations of common contractors.

5. All cost analysis reports and all information obtained from contractors or otherwise by the various Cost Analysis Sections including that of the War Production Board and all information and records of the various Price Adjustment Boards will be available at all times to each of the Price

Adjustment Boards and to each of the Cost Analysis Sections.

6. The Cost Analysis Sections of the War Production Board and of the Departments and the Commission are authorized to make use of the facilities of the Treasury Department, Securities and Exchange Commission, Federal Trade Commission and other proper departments or agencies of the Government in securing and assembling information.

7. Each Price Adjustment Board may establish such policies and procedures for the administration of its proceedings as it may deem proper. Every effort shall be made to keep the procedure of each board simple and flexible. Each board shall keep a written record of each action taken by it. Each board may delegate to any one or more of its members the power to initiate investigations, request information and assistance on behalf of the board and to represent the board in negotiations with contractors.

8. Where contractors have contracts with both Departments or with one or both of the Departments and the Commission, the Price Adjustment Boards of the Department or Commission involved shall agree as to how and by whom the negotiations shall be conducted. [109]

9. No audit shall be made by any Department or the Commission pursuant to Executive Order

No. 9127 without first advising the Cost Analysis Section of the War Production Board.

(Signed) ROBERT P. PATTERSON,
Under Secretary of War.

(Signed) JAMES FORRESTAL,
Under Secretary of Navy.

(Signed) E. S. LAND,
Chairman, Maritime Commission.

Approved:

(Signed) D. M. NELSON,
Chairman, War Production Board.

EXHIBIT G

War Department
Washington

April 25, 1942.

Memorandum for

Directors of all Staff Divisions, Services of Supply.

Chiefs of All Supply Services.

Chief of Each Administrative Service.

Commanding Generals of All Corps Areas.

Subject:

Price Adjustment Board, Services of Supply.

1. There is created within the Services of Supply a Price Adjustment Board.

2. The mission of the Price Adjustment Board shall be to advise and assist the Chief of the Purchase Branch, Procurement and Distribution Division, in securing adjustments and refunds in cases where it is thought that costs or profits of War Department contractors [110] are or may be excessive by reason of the payment of excessive salaries or bonuses or for any reason.

3. The members of the Board will be selected by the Commanding General, Services of Supply, with the approval of the Under Secretary of War. One member will be selected with the approval of the Chairman of War Production Board, as his representative.

4. The Board is instructed wherever appropriate to function jointly with representatives or agencies of the Navy Department, Maritime Commission, and other Departments or agencies of the Government.

5. The Board will receive from the Cost Analysis Section of the War Production Board, the Cost Analysis Section of the Fiscal Division of the Services of Supply, the Supply Services, the Army Air Force, and from any other source, information with respect to contractors who are thought to have excessive costs, to be making excessive profits, or to be paying excessive salaries or bonuses.

6. (a) The Cost Analysis Section of the Fiscal Division of the services of Supply shall upon request of the Board make such audits and analyses as may be designated by the Board and shall secure

for the Board from the Treasury Department, the Securities and Exchange Commission, the Federal Trade Commission, and from any other Department or agency of the Government, or from the contractor involved, such additional information as the Board may request in order to expedite and assist it in the performance of its functions.

(b) All Divisions and personnel of the Services of Supply and the Army Air Force shall furnish such information and assistance to the Board as it may request or as may appear desirable to aid it in the performance of its functions. [111]

(c) To effect full coordination between the Services of Supply, the Army Air Force, and other Departments and to insure a uniform policy, price reductions which are offered to or contemplated by, the Services of Supply and the Army Air Force will be referred to the Chief of the Purchases Branch.

7. The Board is authorized to delegate to any one or more of its members the power to initiate investigations and request information and assistance on behalf of the Board and to represent the Board in negotiations with contractors. The Board shall develop such other policies and procedures as it may deem advisable in performing its functions and accomplishing its purposes.

8. The Board shall report to the Chief of the Purchases Branch, Procurement and Distribution Division, Services of Supply, its recommendations for adjustments with contractors. These recom-

mendations, if approved by the Chief of the Purchases Branch and the Director or Deputy Director of the Procurement and Distribution Division, Services of Supply, shall be transmitted to the Services concerned for the purpose of effecting any renegotiation or revision of contracts required in order to carry out such recommendations.

(Sgd.) BREHON SOMERVELL,
Lieutenant General,
Commanding.

Approved: April 25, 1942.

(Sgd.) ROBERT P. PATTERSON,
Under Secretary of War.

EXHIBIT H

War Department
Headquarters, Services of Supply
Washington

March 13, 1942.

SP-PB-ppp 300.4.

P. B. General Directive No. 31.

To:

The Chief, Chemical Warfare Service.

Chief of Engineers.

Chief of Ordnance.

The Quartermaster General.

Chief Signal Officer.

The Surgeon General.

Commanding General, Transportation Division.

Commanding Generals, all Corps Areas.

Commanding Officers, General Depots.

Subject:

Use of Price Renegotiation Clause in Fixed
Price Contracts.

1. It is essential to eliminate all delays in the production of items immediately required which result from the time required for the negotiation of fixed price contracts. In any case where in the opinion of the Contracting Officer it is desirable that the Contractor immediately commence production or preparation therefor, the Letter Purchase Order prescribed by P. & C. General Directive No. 5, dated January 13, 1942, may be issued pending such negotiation. Where actual production and delivery may occur prior to the execution of the contract, the words "partial payments and" or words of substantially similar import may be inserted in paragraph 4 of such Letter Purchase Order before the words "advance payments." [113]

2. Where a Letter Purchase Order is employed in accordance with paragraph 1 hereof, the contract should be negotiated at the earliest possible date even though final determination of price is impracticable at that time, and provision should be made in the contract for redetermination or renegotiation of the price, as authorized herein.

3. The Contracting Officer, in order to facilitate the execution of the contract and the commencement of work thereunder, may, pursuant to the authority of the First War Powers Act, 1941

(Public 354, 77th Cong.) and Executive Order #9001, insert in the contract and apply either of the following articles: (a) Redetermination of Price (Attachment 1), or (b) Renegotiation (Attachment 2).

4. It will be observed that Attachment 2 imposes upon the Contractor no legal obligation beyond that of furnishing a statement of actual costs and to renegotiate in good faith. Such statement will afford a basis for renegotiation of the contract price. On the other hand, Attachment 1 calls for the application of definite objective standards, thereby making the redetermination of price largely automatic rather than dependent upon renegotiation.

(Sgd) BREHON SOMERVELL,

Lieut. General, Commanding.

2 Incls: Attach. 1, Attach. 2.

Approved by:

ROBERT P. PATTERSON,

Under Secretary of War.

Attachment No. 1.

Article..... Redetermination of Price.

The parties hereto recognize that, because of circumstances beyond their control, accurate estimates [114] of the cost of performing this contract cannot be made within a reasonable time. Accordingly, they agree that the price stated in Article 1 shall be redetermined as provided below, upon the basis of the actual experience of the Contractor in

performing part of his contract. Such redetermination of the price shall be made as follows:

(a) The estimated cost of performing this contract, upon which the price stated in Article 1 is based, is \$....., itemized as follows:¹

A. Factory Cost:

1. Direct materials
2. Direct productive labor
3. Direct engineering labor
4. Miscellaneous direct factory charges
5. Indirect factory expenses²

(State basis of allocation)

Total Factory Cost

- B. Other manufacturing cost
- C. Miscellaneous direct expenses
- D. Indirect engineering expenses
- E. Expenses of distribution, serving and administration
- F. Guarantee expenses

(b) It is agreed that the cost of production of the first% of items called for hereunder, hereafter referred to as the "preliminary run" will not necessarily be typical for the remainder of the contract. The cost of production of the next%, [115] hereafter referred to as the "test

¹This breakdown may be altered to suit particular circumstances.

²State separately the estimated amount of each of the following items included:

- (a) Normal depreciation.
- (b) Special amortization.

run” shall be used as the general basis for re-determination. Within days after the completion of the production of the “test run”, the Contractor shall submit to the Contracting Officer separate statements of the actual cost of the production of the “preliminary run” and the “test run”, itemized in the same way as the estimated cost stated above. Such statement shall be based upon the cost accounting system regularly utilized by the Contractor and certified as correct by an independent public accountant or by two officers of the Contractor. The Contractor shall submit his books and accounts to such examination and audit as shall be requested by the Contracting Officer.

(c) If the actual cost of production of the preliminary run plus the cost of the production of the remainder of the items called for by the contract, as indicated by the actual cost of production of the “test run”, is less than the total estimated cost stated in paragraph (a), the total price to be paid pursuant to Article I shall be reduced in the same ratio.

(d) Pending the redetermination of the price hereunder, all items delivered shall be paid for at the price set forth in Article 1. Upon the redetermination of such price hereunder, an amount equal to the difference between the price paid on all items theretofore delivered and such redetermined price for such items shall be applied by the Contractor as a credit against payment for subsequent deliveries, or shall be applied or returned

to the Government as directed by the Contracting Officer.

(e) If this contract contains an escalator clause (Price Adjustment), notwithstanding any provisions of such escalator clause which may be inconsistent herewith, that clause shall be understood to relate only to that portion of the production under the contract [116] which is not covered by the statements of actual cost required by paragraph (b) of this article. The blanks in the escalator clause will be filled in at the time of redetermination hereunder, and the month in which the redetermination is made shall be taken as the base month for such escalator clause and the estimated labor costs and the estimated material costs shall include only such costs as are not reflected in the actual cost statements. For this reason the blanks in the escalator clause were not filled in at the time of the execution of this contract.

Attachment No. 2:

Article Renegotiation.

(a) The Contractor represents that the contract price provided in Article is based upon a total estimated cost of \$..... itemized as follows:¹

A. Factory Cost:

1. Direct materials
2. Direct productive labor
3. Direct engineering labor

¹This break-down may be altered to suit particular circumstances.

4. Miscellaneous direct factory charges
5. Indirect factory expenses.²
(State basis of allocation)

Total Factory Cost

- B. Other manufacturing cost
- C. Miscellaneous direct expenses
- D. Indirect engineering expenses
- E. Expenses of distribution, servicing and administration
- F. Guarantee expenses

(b) Within days after the completion of the production of% of the items called for under this contract, the Contractor shall submit to the Contracting Officer a statement of the actual cost of the production of said percentage, itemized in the same way as the estimated cost stated above. Such statement shall be based upon the cost accounting system regularly utilized by the Contractor and certified as correct by an independent public accountant or by two officers of the Contractor. The Contractor shall submit his books and accounts to such examination and audit as shall be requested by the Contracting Officer.

(c) Upon the written request of either party, which request shall be made within days after the filing of the statement required by paragraph (b) hereof, the Contracting Officer and the

²State separately the estimated amount of each of the following items included:

- (a) Normal depreciation.
- (b) Special amortization.

Contractor will enter into negotiations and will attempt to agree upon a modification of the contract.

(d) Pending the renegotiation of the price hereunder, all items delivered shall be paid for at the price set forth in Article 1. Upon the renegotiation of the price hereunder, an amount equal to the difference between the price paid on all items theretofore delivered and such renegotiated price for such items, if in the Government's favor, shall be applied by the Contractor as a credit against payment for subsequent deliveries, or shall be applied or returned to the Government as directed by the Contracting Officer; if in the Contractor's favor, it shall be paid by the Government on a separate invoice or voucher.

(e) If this contract contains an escalator clause (Price Adjustment) the figures set forth therein and the terms thereof shall be controlling in the absence of a modification of the contract under this article. In the event of such a modification, the escalator clause shall be so modified as to relate only to that portion of [118] the production under the contract which is not covered by the statement of actual cost required by paragraph (b) of this article. In modifying the provisions of the escalator clause, the month in which the renegotiation occurs shall be taken as the base month, and the estimated labor costs and the estimated material costs shall include only such costs as are not reflected in the actual cost statement submitted under paragraph (b) hereof.

EXHIBIT I

Joint Resolution to Provide for the Renegotiation
of Contracts for the Production of War Mate-
rials for the Purpose of Limiting Profits There-
under

Whereas it is imperative that effective measures be taken to limit the profits paid to contractors obtaining contracts for the production of war materials; therefore, be it

Resolved by the Senate and the House of Representatives of the United States, in Congress assembled, That—

1. The Secretary of War is directed to insert in any contract hereafter made by the War Department, which, in his judgment, may result in an excessive profit to the contractor, a provision for the renegotiation of the contract price at a period when the profits can be determined with reasonable certainty.

2. The Secretary of War is directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with the War Department, to require such contractor to renegotiate the contract price. This provision shall be applicable to all contracts hereafter made and to all contracts heretofore made, whether or not such contracts contain a renegotiation clause, provided that final payment [119] has not already been made pursuant to such contract.

3. In renegotiating a contract price the Secretary of War shall not make allowance for any

salaries, bonuses, or other compensation paid by the contractor to its officers or employees, in excess of a reasonable amount, nor shall he make allowance for any excessive reserves set up by the contractor, and the Secretary of War shall freely use the powers of audit conferred upon him by existing law for the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been set up.

4. In addition to the powers conferred by existing law, the Secretary of War shall have the right to demand of any contractor who holds uncompleted contracts with the United States for the production of war materials in the aggregate amount of \$500,000 or more statements of actual costs of production and such other financial statements, at such times and in such form and detail as the Secretary of War may require.

5. The authority and discretion herein conferred upon the Secretary of War may be by him delegated to such individuals or agencies in the War Department as he may designate and he may authorize such individuals to make further delegations of such authority and discretion.

6. The foregoing provisions shall be applicable to the Secretary of the Navy in the case of contracts with the Navy Department, and to the Chairman of the Maritime Commission in case of contracts with that Commission. The powers conferred by paragraph 4 above shall be exercised by the

War Department, the Navy Department, or the Maritime Commission, which ever holds the largest aggregate amount of uncompleted contracts for the production of war materials.

[Endorsed]: Filed Jan. 23, 1945. [120]

[Title of District Court and Cause.]

AFFIDAVIT OF H. STRUVE HENSEL IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT [121]

City of Washington,
District of Columbia—ss.

H. Struve Hensel, being first duly sworn, deposes and says:

1. I am General Counsel for the Department of the Navy, appointed by the Secretary of the Navy. I was appointed a Special Assistant to the Under Secretary of the Navy in January, 1941, and was appointed Chief of the Procurement Legal Division (which preceded the Office of the General Counsel for the Department of the Navy) upon the formation of that Division in July 1941. I have general supervision over all procurement legal matters in the Department of the Navy, and my office drafts or approves the provisions of Navy contracts.

2. The statements made in this affidavit are based upon information received by me in my official capacity and which I believe to be true and accurate.

I. SCOPE AND COMPLEXITY OF NAVY PROCUREMENT

3. The armed services in December 1941 were faced with procurement problems on a scale beyond anything which they had theretofore experienced. The problems of allocating materials and manpower were enormous. The Army and Navy urgently needed ships, planes, tanks and other munitions of every kind, regardless of cost. The logistics requirements had changed so much and so swiftly with the outbreak of war that the available data on the Government's previous procurement were of very little assistance in [122] fixing prices which would closely reflect the ultimate costs.

4. Prior to the emergency period, all Navy contracts were let as the result of competitive bidding. The first step away from this requirement was taken in the Act of April 25, 1939, when the Congress authorized construction of naval facilities on island bases on a cost-plus-a-fixed-fee basis. In the next fifteen months several further authorizations were enacted allowing the negotiation of cost-plus-a-fixed-fee contracts for construction.

5. The first major expansion in the Navy's war-procurement planning was in June, 1940. Upon the fall of France and the Low Countries, the Congress voted to make substantial additions to the United States Fleet. By December, 1941, Navy procurement programs had been accelerated as demands from the Fleet became more imperative. After December 7, 1941, the procurement tempo skyrocketed.

So many different items were needed in such large quantities, by both the War and Navy Departments, that the Navy Department felt compelled to give a commitment to almost any manufacturer who demonstrated ability to perform the work.

6. In June and July, 1940, the authorized strength of the Navy was approximately doubled. The "11 percent Expansion Act" of June 14, 1940 and the "70 percent Expansion Act" of July 19, 1940 (the Two-Ocean Navy Act) were passed in recognition of the threats to this nation's security implicit in the German victories. These authorizations of increased Navy strength were accompanied by grants of contract authority and the necessary appropriations. The Act of June 28, 1940 (Public No. 671, 76th Congress) granted limited authority to negotiate contracts for vessels, propulsion machinery and equipment, and also [123] granted the necessary authority to construct facilities to build the vessels and munitions. Requests to the Congress for authority to negotiate contracts had emphasized that the Navy had need for utilizing the services of all shipbuilders, all manufacturers of naval ordnance and other munitions, rather than the services of only those making the lowest bids. In point of fact, the contracts let by the Bureau of Ships in late 1940 and the first half of 1941 to carry out the additions to the Fleet authorized by the Congress, in large part tied up the existing naval shipbuilding capacity of the nation. Although new shipbuilding facilities were being constructed and completed throughout the last half of 1940 and 1941, it was not

until early 1942 that the completion of vessels on the ways and the availability of the new shipbuilding facilities made possible the execution of another large group of shipbuilding contracts.

7. The vastness of the procurement programs in 1941 and the early part of 1942, as compared with earlier programs, tended to subordinate all other considerations to the single factor of getting the munitions. The Navy did not during this period have any mechanism for determining close contract prices or for controlling profits under its contracts. More important, neither the Navy personnel responsible for procurement nor the contractors had any experience to enable them to gauge profits accurately. Many contractors were making new items which had never before been manufactured in this country. Manpower problems began to be acute with the acceleration of inductions under the Selective Service Act. No one had any idea as to what effect manufacture of ordnance and other items by the thousands instead of by single items or in small lots would have on profits. It proved generally impossible to make allowance in [124] advance for increased efficiency gained from experience, and the greater profits, resulting from increased volume. In instance after instance the Navy found that costs and profits seemingly reasonable at the start of the contract became unreasonable after volume and experience had increased. The important contracts were so large that a small margin of error in computing prices could wipe out the contractor's capi-

tal. Conversely, allowances for contingencies, intended only for protection, often turned into unexpected profits. Finally, Navy personnel during this period were more interested in getting the munitions than in limiting profits under the contracts for such munitions.

a. Contract Statistics

8. The scope of the problem of acquiring naval supplies and equipment at reasonable prices can be discovered by examination of some Navy statistics for this period.

i. Commitments and Expenditures

9. For the calendar years 1940-1944, the Navy's commitments and expenditures of appropriated funds were as follows (in billions of dollars):

	Fiscal, 1940	Fiscal, 1941		Fiscal, 1942		Fiscal, 1943		Fiscal, 1944	
		7-1 to 12-31-40	1-1 to 6-30-41	7-1 to 12-31-41	1-1 to 6-30-42	7-1 to 12-31-42	1-1 to 6-30-43	7-1 to 12-31-43	1-1 to 6-30-44
Commitments	\$1.1	8.5	4.2	6.0	17.2	13.8	13.0	12.2	12.0
Expenditures	....	0.9	1.7	2.8	6.2	7.6	13.8	12.2	14.9

The commitments represent roughly the amount of contract obligations (including letters of intent) executed; plus amounts for pay, subsistence and transportation of naval personnel (for the fiscal years 1941 to 1944, inclusive, expenditures for these purposes, in billions of dollars, were 0.32, 0.65, 2.01 and 4.8, respectively). It will be noted that commitments in the first [125] half of 1942 almost tripled those of the latter half of 1941, and that expenditures in the first part of 1942 were more than double those of the earlier period. Furthermore, both commitments and expenditures for the second half of 1941 had gone up very considerably over those of the first half of 1941.

ii. Number and size of contracts

10. The following figures indicate the vast increase in procurement contracts during the months of the fiscal year 1942 beginning July 1, 1941 up through April 30, 1942. The figures include all new work awarded, consisting of all new contracts, letters of intent and extensions of existing contracts. Letters of intent were the informal (but nonetheless binding) contracts awarded to a manufacturer in order to authorize him to get started on the work in advance of the time when detailed contract terms or prices could be worked out. They were often used when specifications were not completed, when it was necessary to finance the contractor immediately, or when the detailed terms—including often intricate payment provisions and delivery schedules—might take a long time to negotiate.

(\$1,000,000's)

	1941						1942			
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.
Total dollar amount of awards	\$662.8	342.1	565.6	414.1	487.1	1,026.3	1,372.9	2,927.5	2,202.9	1,953.8
Expenditures .....	.....	.....	.....	\$450	400	700	600	700	1,100	1,200
Total number of awards over \$50,000	541	473	434	587	604	749	1,083	1,085	1,344	1,727

11. The above figures are further broken down by Bureaus as follows:

(\$1,000,000's)

	1941						1942			
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.
NOd contracts (signed by Secretary — primarily facilities, vessels)										
\$ Amount	\$73.6	40.0	121.8	79.9	4.9	50.0	37.9	6.3	10.1	33.7
No. over \$50,000	32	31	40	26	7	23	21	15	15	38
NOrd Contracts (BuOrd)										
\$ Amount	\$12.3	23.7	13.2	11.0	61.5	27.2	58.7	35.9	99.4	138.4
No. over \$50,000	8	9	8	22	36	26	25	27	70	87

		(\$1,000,000's)									
		1941					1942				
		July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.
<hr/>											
NOs, NXs Contracts											
(BuSandA)											
\$ Amount	\$306.3	247.2	372.8	228.7	281.8	724.0	747.7	2,344.4	1,254.5	1,135.5	
No. over \$50,000.....	351	340	318	404	362	477	670	657	735	1,070	
<hr/>											
NOy Contracts (BuY&D)											
\$ Amount	\$264.4	25.9	55.4	100.3	110.4	101.4	143.4	145.1	184.2	331.5	
No. over \$50,000.....	128	66	80	120	167	180	230	251	380	326	
<hr/>											
NObs Contracts (BuShips)											
\$ Amount	---	---	---	\$0.9	5.5	119.5	361.7	315.8	628.4	230.8	
No. over \$50,000.....	---	---	---	2	15	26	61	78	96	116	
<hr/>											
NOa Contracts (BuAero— only facilities)											
\$ Amount	---	---	---	---	\$21.6	2.9	5.4	71.3	21.0	66.1	
No. over \$50,000.....	---	---	---	---	11	4	14	20	27	26	
<hr/>											
NOm Contracts (Marine Corps)											
\$ Amount	\$6.2	5.4	2.4	2.2	1.6	4.3	18.2	8.7	5.1	9.4	
No. over \$50,000.....	22	27	8	13	6	13	56	37	21	55	

Throughout this ten-months' period, the Bureau of Supplies and Accounts executed all contracts for the articles specified by the Bureau of Aeronautics (except facilities) and for a great many of the articles specified by the other Bureaus. In September and October 1941, the Secretary delegated his power to execute negotiated contracts to the Chiefs of the several Bureaus; this fact accounts for the change in distribution of the contracts awarded following such months.

iii. Decline in use of competitive bids

12. The following table shows the predominance of the negotiated contract as compared with contracts let after competitive bids during the period in question:

	1941							1942		
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.
Competitive bids	\$ 96.9	78.4	88.9	87.5	101.1	121.8	112.1	73.7	67.9	107.2
Negotiated contracts (including letters of intent and extensions of existing contracts)	\$505.1	250.0	457.1	311.4	362.0	869.2	1,222.6	2,803.2	2,112.6	1,835.3

(\$1,000,000's)

Under the old competitive bid contract, used prior to the emergency, there was almost no pricing problem—the contract was awarded to the lowest bidder. It is true that a modified system of competitive bids was used in the award of many negotiated contracts; the Department would request several manufacturers to submit, more or less informally, their estimated prices. The manufacturer submitting the low price would, other conditions being equal, receive the bulk of the Department's order for the item to be procured. In many cases, the Department would negotiate contracts with all of the manufacturers submitting prices; the high bidders would receive contracts for lesser quantities than the low bidders. Under this modified form of bidding, however, there was some negotiation in the arrival at the final contract price, and pricing was much more of a problem than it had been under the earlier system of competitive bidding.

iv. Dollar amount of letters of intent

13. The progressive increase in the use of letters of intent indicates the pressure which was being put upon contracting officers. The following table demonstrates the increasing reliance upon letters of intent: [128]

	(\$1,000,000's)											
	1941					1942						
	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.		
Total contracts awarded....	\$662.8	342.1	565.6	414.1	487.1	1,026.3	1,372.9	2,927.5	2,202.9	1,953.8		
Letters of intent	\$124.9	20.6	80.1	33.0	23.1	249.6	628.8	2,408.6	1,416.5	860.7		
Previous months' letters of intent superseded by contracts executed .....	....	....	....	....	\$48.2	57.6	26.1	53.7	223.7	297.9		

The use of letters of intent in the Bureau of Ships is particularly striking:

BUREAU OF SHIPS—CONTRACTS AWARDED

(\$1,000,000's)

	1941, Dec.	Jan.	1942 Feb.	Mar.	Apr.
Total contracts awarded.....	\$119.4	361.7	315.7	628.4	230.8
Letters of intent	\$119.4	361.7	313.5	628.4	225.8
Previous months' letters of intent superseded by con- tracts	\$0.3	---	6.1	---	---

14. In conclusion, the contract figures for the fiscal year 1942, from July, 1941 until the passage of the renegotiation statute, show (1) a great increase in the amount of materiel contracted for, (2) virtual abandonment of competitive bidding as a method of awarding contracts and (3) an increasing use of the letter of intent.

b. General Factors Making Close Prices Difficult

15. A number of factors complicated the procurement programs at this time. These factors were more or less inevitable with the outbreak of war and the huge spurt in procurement.

i. Lack of experience

16. The enormous increase in procurement tells its own story. The Navy Department had no experience enabling it to cope with the problem of fixing close [129] prices under the new procurement programs. Contractors were being asked to

produce items in quantities never before contemplated. Thus, in late 1940 and early 1941, contracts for vessels were let in quantities exceeding those of the first World War, and in early 1942, these quantities were still again increased. A single contract for one ordnance item (5" gun mounts) which had theretofore not been made outside Government gun factories, called for a quantity of such items in excess of the total number previously made in this country in the gun factories. Many other examples could be cited.

17. Contractors were called upon to manufacture new items which had never before been produced—such items as radar equipment, new plane and vessel designs, floating drydocks, and Bofors and Oerlikon guns. Specifications for some items were not completed until the contract was performed; the requirements for other items were changed constantly through the life of the contract.

18. Many contracts were long-term contracts which extended for more than one year. The majority in dollar volume of combatant ship contracts were contracts for twelve months or more. Similarly, most of the contracts for construction of public works and facilities, and for air frames and engines were long-term contracts. The bulk in dollar amount of contracts let for these items in the fiscal year 1942, prior to passage of the renegotiation statute, ran until 1942 or 1943. Almost all aircraft and construction contracts were let on a cost-plus-a-fixed-fee basis. Of the contracts for vessels, a larger dollar amount were made on the fixed-price basis,

but these fixed-price contracts were made subject to adjustment and escalation in respect of direct labor and material costs. [130]

19. Contracts were awarded to many contractors, particularly in the aircraft industry, in amounts tens and evens hundreds of times greater than their capital investments.

ii. Problems in building up procurement personnel and organization

20. For the fiscal year 1940, obligations of Navy appropriated funds totalled approximately 1.1 billion dollars; for the fiscal year 1941, obligations were about 12.7 billion dollars, (note the table in paragraph 9 above). In fiscal 1942 total obligations were 23.2 billion dollars, with obligations in the second half of such fiscal year (i. e., the first half of calendar 1942) amounting to 17.2 billion. The dollar volume of obligations incurred in the first six months of 1942 was comparable to the dollar volume of obligations incurred in the preceding two and one-half years (2.8 billion dollars less). The great jump in contract obligations which took place in the second half of 1940 was largely due to the great expansion in shipbuilding authorized in mid-1940, and, to a somewhat lesser extent, to the expansion in plane authorizations and construction of public works and facilities.

21. Within two years, the procurement machinery of the Navy had to be stepped up to the point where it could turn out, in a six-months' period, contracts for munitions for about thirty-one times the dollar amount of the obligations incurred in the

first half of 1940 (approximately \$0.55 billion—50% of the \$1.1 billion commitments recorded for the twelve months of fiscal 1940—as compared with \$17.2 billion in the first six months of 1942.) The difficulties of turning out the contracts for the widely diversified items procured by the Navy (from battleships to buttons, from planes to pork products) increased rather in a geometric progression as the dollar amount of Navy needs [131] and the number of Navy contracts necessary to fulfill such needs multiplied.

22. The Navy Department started its emergency procurement program in June, 1940, with personnel adequate to handle one billion dollars of procurement per year; it was impossible, within the year and one-half which followed, to build up the personnel who could handle procurement at the rate of 34 billion dollars per year (17.2 billion dollars for the first half of 1942), and at the same time achieve close pricing on the munitions for which contracts were being written. Even if there were in the country enough persons skilled in procurement problems and analysis of costs to undertake to fix close prices on munitions, such persons would have had no background of experience in the prices of a large proportion (if not most in dollar volume) of the items procured by the Navy. Not only was the Navy Department purchasing many items which had never before been made by the contractors, but it was also purchasing items in such quantities in 1941 and early 1942 that previous price experience was almost useless as a guide.

23. It is most important to recognize that pricing was only one of the factors which had to be considered by the Navy Department in expanding its procurement. The enormous increase in the number of technical personnel — engineers, architects, designers—required to handle the specifications for Naval materiel can be understood readily enough. Another factor too often overlooked is the mechanical problem of getting out completed contracts. The Bureaus, which prepared all of the contracts, had to set up entirely new contract organizations. The coordination of procurement by the Bureaus became increasingly difficult—what had been relatively simple when procurement was at the rate of one billion dollars a [132] year became extremely complex when procurement jumped twelvefold, and then twenty-three fold. Many different efforts at coordination were made; the agencies most responsible for unifying contract policies—the Procurement Legal Division of the Under Secretary's Office and the Office of Procurement and Material of the Secretary's Office—were not established until July, 1941 and January, 1942, respectively. Organizations to assist contractors—in obtaining priorities, solving labor problems, building facilities, securing capital—all had to be established and manned, and it took time for such organizations to acquire the necessary know-how. Other organizations were required to coordinate Navy procurement policies and procedures with the policies and procedures of other Government agencies, to prevent the competition for

contractors which helped to demoralize the early procurement of World War I.

24. The Navy Department had made a fair beginning towards solving these many problems at the time war was declared. The declaration of war, however, at the same time rendered imperative the immediate functioning of all of the agencies necessary to handle the procurement problems, and also made the problems much more acute. Through all of the process of organization for wartime procurement, the contracts had to be turned out, and in far vaster quantities than theretofore. One partial solution, of course, was the issuance of letters of intent rather than the more formal contracts, which could be worked out thereafter. The figures which I have cited earlier indicate the extent to which this device was used in the period under consideration. The use of letters of intent, however, merely postponed the day when the more formal contract was to be written; and at several times the backlog of letters of intent became perilously [133] large. And the problem of pricing still remained when letters of intent were used. The Department did issue some letters of intent under which prices were fixed, but as a general rule, the letters of intent were silent as to prices, with the understanding that prices would be set later in the definitive contract.

25. The Navy Department was struggling, throughout the year and one-half prior to passage of the renegotiation statute, to obtain personnel to get out the specifications, to write the contracts, and to aid in the production, of the materiel required. In-

deed, we have not today completely solved this problem—we still have need of experienced personnel who can take over the constantly changing procurement problems.

iii. Uncertainties as to costs

26. Added to the absolute lack of experience as to the cost of many items and the difficulties inherent in training personnel to meet new problems of theretofore unrivalled magnitude, were the many uncertainties as to certain costs—in 1941 and 1942 the scarcity of materials and of manpower, and rising prices and wages, made particularly difficult the forecasting of costs.

27. The problem of material shortages became acute in early 1942. The predecessor to the War Production Board had been established to administer the priorities authorized by the “Navy Speed-Up Act” of June 28, 1940. The Army and Navy Munitions Board had been working with the War Production Board and its predecessors for the one and three-quarter years prior to April, 1942, in enforcing a system of priorities in metals for Government contracts. In the first half of 1942 the armed services and the War Production Board were engaged in working out a system of control much stricter than that theretofore in [134] effect—the Production Requirements Plan, which was put into effect on July 1, 1942. The application of all of the priority ratings was an immensely complicated job, which was administered in the Navy Department by the Production Branch of the Office of Procurement

and Material. In addition to the metals covered by the priority schedules, there were several other raw materials which were at this time extremely critical because of shipping losses and other factors.

28. At this same time also, manpower shortages were beginning to be felt as the draft was stepped up enormously, although the shortage in manpower became most critical some months later.

29. The armed services had experienced some labor and wage troubles at the plants of contractors. The most acute cases were, of course, those of North American Aviation, Inc., which was taken over by the War Department under Executive Order No. 8773 dated June 9, 1941, and Federal Shipbuilding & Dry Dock Co., which was taken over by the Navy Department under Executive Order No. 8868, dated August 23, 1941. Wages were rising, from early 1941 onward. In mid-1941, the Navy took the initiative in having the nation's shipbuilders enter into zone agreements with respect to labor. These agreements, while they helped to insure a supply of labor, had the undoubted effect of raising labor costs at most shipyards, including those not covered by the agreements, which tended to raise wages for all shipyard workers. There was also established a shipbuilding stabilization program reimbursement policy, to which the Navy Department, War Department and Maritime Commission adhered; the three agencies have from time to time issued administrative instructions governing reimbursement to shipbuilders of specific labor costs. Zone agreements somewhat similar to those in the

[135] shipbuilding industry were likewise established for the construction and building-trades industries.

30. Wages continued to rise throughout late 1941 and the first part of 1942, and the trend was not effectively checked until after the President's "hold-the-line" Executive Order 9250 (promulgated upon passage of the Second Emergency Price Control Act of 1942 on October 2, 1942) which empowered the President to establish wage ceilings. Overtime charges began to mount in late 1941. As the War and Navy Departments demanded speeded-up production and extra shifts, they promised fixed-price contractors, who had not contemplated substantial overtime wages at the time their contracts were let, that the contract prices would be adjusted in the light of the overtime payments.

31. Scarcity of materials and growing scarcity of manpower made for higher costs to contractors. From the very inception of the national defense program, contractors were fearful of price rises which might wipe out not only their profits under long-term contracts, but also their entire companies. They were therefore insistent upon protection by the Government against such price rises. From the latter part of 1940 on, escalator clauses were demanded with increasing frequency under fixed-price contracts. In 1941 and early 1942, I should judge that the great majority in dollar amount of fixed-price contracts provided escalation in some form or another. Many contractors faced with the production uncertainties which I have outlined above, in

addition to price increases, insisted upon cost-plus-a-fixed-fee contracts to protect themselves.

32. Increases in production and in efficiency were so swift that in many cases the increased costs which had been anticipated and were to be covered by escalation [136] were completely swallowed up in the greater than anticipated profits earned by contractors. It had been, and still is, generally impossible to forecast accurately the effects upon costs, of increased volume or of the productive efficiency of Navy contractors. In addition to this fact that contingent costs (against which escalation was provided) were offset by unanticipated profits, the fixed price under any contract containing an escalator clause invariably also contained allowances for many contingencies not covered by escalation. Escalator clauses did not provide complete protection against fluctuation in costs; there were at the time many uncertainties as to overhead costs against which the contractor claimed to have no protection except amounts for contingencies included in his contract price. In practice, price escalation worked only upwards, although the escalator clause generally did provide for revision downwards of prices based on direct labor and material costs, as well as for revision upwards thereof. The cost-plus-a-fixed-fee contract was virtually a riskless contract. As the production of so many contractors increased many times over, the return in profits under fees fixed upon the volume of their business amounted to vastly more on their capitalization than had profits prior to the emergency and war periods.

33. Manufacturers demanded protection against the uncertainties facing them; the Navy Department, which had no means of forecasting costs, of necessity had to provide the protection in its contracts in order to obtain the munitions. In general, Navy contractors in 1941 and early 1942 were including in their fixed-price or estimated cost (under cost-plus-a-fixed-fee contracts) allowances for almost all contingencies which could conceivably happen. Almost never did more than a portion of such contingencies happen with respect to a single contractor. In addition, production [137] techniques improved so much more rapidly than expected with respect to a great many items that actual costs in quantity procurement were far lower than those which might reasonably have been expected.

iv. Navy contracting and pricing personnel

34. As the statistics earlier cited make clear, most of the increased procurement from mid-1940 to April 1942 (and to date) has been accomplished under negotiated contracts. A very substantial proportion of these contracts were cost-plus-a-fixed-fee contracts, including almost all construction contracts and plane contracts; all facilities contracts provided for reimbursement of costs to the contractor. With respect to the fixed-price negotiated contracts, it was necessary to negotiate prices with the contractors on the basis of estimated costs. The cost of performance was to the extent based upon past experience, but past costs were generally stepped up by the inclusion of allowances covering the many

uncertainties facing the contractor. The contractor would not undertake the work without adequate protection—and the Navy Department had no valid argument, in the light of the uncertainties as to costs facing the contractor, for rejecting allowances for the protection of the contractor. There was always the possibility, of course, that not all of the contingencies against which protection was being provided in the price would occur, but no one in the Navy Department or anywhere else was able to forecast what contingencies would occur and what ones would not. It is true that many of the fixed-price contracts provided escalation for certain costs, but the inclusion of escalation was necessary in such cases to provide the further cushion without which the contractors would not undertake to risk the hazards inherent in a fixed price. [138]

35. Prices under contracts awarded after competitive bids were of little aid in determining prices for similar items under negotiated fixed-price contracts. Bidders for Navy contracts submitted bids on the basis of comparative prices and of what they anticipated would be the lowest price, rather than on any very close analysis of costs. In any event, the quantities specified in these earlier contracts and the conditions under which they were let did not afford any precedent for pricing in the later period. With the advent of the negotiated contract, more and more of the nation's industrial capacity was converted to Government work. Competitive forces ceased to have any bearing upon prices—in

practical effect, all contracts let were based upon crude estimates of costs, however faulty the early estimates might be, plus an additum for contingencies and profit. As the House Naval Affairs Committee discovered, prices under negotiated contracts were generally lower than prices for comparable items under contracts let to the lowest bidder.

36. At the beginning of the emergency period (June, 1940), the outlook of the Bureaus relative to prices were slanted almost entirely toward purchasing on the competitive bid basis. The Bureau of Supplies and Accounts continued to award some contracts during this period of early 1942 on the basis of competitive bids. Several of the Bureaus had personnel who dealt with comparative prices, based on past experience; such personnel sought to work out prices with contractors. The Bureau of Supplies and Accounts, which had been purchasing standard items in quantity for years, did have some comparative data on prices, based on the competitive bid awards. But, as procurement vaulted to quantities many times the quantities purchased before the war, this data became increasingly obsolete. [139] It was true that the Stock, Schedule and Statistical Sections of the Bureau kept records of past purchases and that such records would be of value in ascertaining the propriety of a negotiated fixed-price. The other Bureaus had only a handful of personnel engaged in drafting of contracts and pricing thereunder, and began in the latter part of 1940 to build up their contract divisions.

37. The new contracting personnel necessary to handle the increased volume of procurement, gradually gained experience with pricing; their training took time. At the start of the emergency procurement, there was on hand inadequate data as to contractors' costs, and consideration of prices offered by contractors was based largely on comparison with prices paid by the Navy for similar munitions in the past, usually under very different conditions. Past experience naturally offered little guide in the determination of prices to be paid for articles which had never been built before, as we discovered in the cases of destroyer-escorts and anti-aircraft guns, for example.

38. As of April 28, 1942 the Navy Department did not have any working organization whose primary responsibilities were analysis of prices and advice in the negotiation of accurate prices which when compared with costs would not allow undue profits. The Cost Analysis Section and the Price Adjustment Board had just been established in the Office of Procurement and Material (itself organized on January 30, 1942) attached to the Secretary's Office, and had had little opportunity to accomplish anything in the way of recommending price reductions. There was no agency—and would not be until July or August, 1942, when the Price Negotiation Branch of Supplies and Accounts was set up—which was in negotiating a [140] procurement deal solely responsible for checking into the contractor's probable costs and for seeking to determine whether the prices submitted should be re-

duced. A lot of thought had gone into the matter of high prices and excessive profits, and we were slowly moving toward corrective measures which proved to be effective. It is true that before the war, almost half in dollar amount of negotiated contracts were let on a cost-plus-fixed-fee basis, or on a cost basis in the case of facilities, and a substantial portion of contracts were still being made to the lowest bidder after solicitation of competitive bids. Past experience was of little assistance in the latter case. Most of the large profits earned by Navy contractors were due to increased volume or ability of the contractor, making a new article with which he was unfamiliar, to reduce his costs promptly, and to allowances for contingencies which did not arise. The Navy Department did not have the pricing experience at this time to deal adequately with these factors. Again I want to point out quite frankly that the Department was primarily interested in getting the munitions as promptly as possible. In the haste to acquire the material of war, it had also to expand and develop its procurement organization. The Navy Department had at the time neither the knowledge nor the experienced personnel necessary to achieve close pricing—and indeed, during wartime, it may be doubted whether anything but limited success in negotiating prices to reflect costs can be achieved.

c. Specific Contract Prices During This Period
(July, 1941-April, 1942)

39. Naturally, as contractors gained experience, and as the Navy became better able to analyze costs,

it has [141] been possible to negotiate lower prices on a great many items. I have listed some of the factors which made for high prices and high profits. I submit some actual examples of prices under contracts let during this period and subsequent reductions of these prices.

i. Bureau of Ships

40. The Bureau of Ships was responsible in 1941 and 1942 for the expenditure of a larger dollar volume of appropriations than was any other Bureau (although the Bureau of Supplies and Accounts in the months prior to passage of the renegotiation statute was writing a larger dollar volume of contracts, because of the large number of contracts such Bureau wrote upon requisition from the other Bureaus). The value of ships completed and converted under Navy contracts rose from about \$142,-146,000 in the second half of 1940, to \$720,494,000 in the first half of 1942, to \$3,590,509,000 in the first half of 1944. For the fiscal year 1941 (July 1, 1940-June 30, 1941), expenditures by the Bureau of Ships totaled \$912,000,000, as compared with \$3,-074,000,000 for the next fiscal year, and \$9,384,000,-000 for the fiscal year 1944 (June, 1944, estimated).

41. The contracts necessary to fulfill the 11% and 70% expansions of the Navy (authorized by the Congress in June and July, 1940) were largely awarded by the end of the first quarter of 1941. In general, these contracts, which each specified the delivery of a number of combatant ships, were not completed until the latter part of 1942 and 1943.

On the average, the following lengths of time are required to complete the several combatant ships:

Battleships	32 to 35 months
Aircraft carriers	17 to 21 months. (The escort carriers require about 11 months.)
Cruisers	22 to 25 months
Destroyers	7 to 13 months
Destroyer Escorts	7 months
Submarines	11 months

42. I have had compiled data on some 13 contracts executed between July 1940 and February, 1941, covering combatant ships. These contracts, all of which were made on a fixed-price basis, subject to adjustment according to changes in direct labor and material costs, provided a total of \$750,097,400 (before adjustment) of contract prices. None of these contracts was completed until late 1942 or 1943. They were completed at a total cost to the contractors of \$514,720,566. The total profit under the contracts, disregarding adjustments and disregarding renegotiation and voluntary refunds, would therefore have amounted to \$235,376,834, or 45.7% of the cost of performance. The cost of performance included increases in labor and material prices during the lives of the contracts, whereas the contract prices as above stated have not been adjusted upward in accordance with escalator adjustments to which the contractors would have been entitled under their contracts. Since the basic month for escalator purposes was between July, 1940 and February, 1941, and the expenditures were incurred from one to two years later, sharp upward adjustments

would have been required if escalation had been computed—it is estimated that such adjustments would have amounted to 10 to 15% of the cost in the case of destroyers, and 15 to 20% of the cost in the case of the larger vessels. As examples of the discrepancies between original unit contract prices and unit costs to the contractor under these contracts, I cite the following:

		Number of Ships	Original Unit Price	Average Unit Cost	Difference as Percent- age of Costs
Destroyer Program					
1st contract	6		\$7,159,700	\$5,445,225	31.5
2nd contract	6		6,813,200	4,560,074	49.5
3rd contract	8		5,379,000	4,705,896	14.3
4th contract	5		7,360,000	4,900,245	50.2
5th contract	17		6,813,000	4,425,605	53.9
6th contract	6		5,977,000	4,241,268	40.9
7th contract	4		5,579,000	4,620,142	20.8
Carrier Program					
1st contract	2		43,662,000	26,625,000	64.0
2nd contract	1		42,725,000	26,500,000	70.6
3rd contract	3		46,125,000	26,600,000	73.4
Cruiser Program					
	2		19,272,500	14,725,000	30.9
Submarine Program					
1st contract	13		2,795,000	2,246,761	24.4
2nd contract	25		2,765,000	2,246,761	23.1

At the time of the award of the above contracts, there was an informal understanding between the Bureau of Ships and the contractors that if actual costs proved to be out of line with the prices fixed, some adjustments would be made. In practice, since none of these contracts was completed until after the passage of the renegotiation statute, all were renegotiated under the statute.

43. Both the destroyer-escort program and the landing-craft program were launched in force in early 1942, although the great majority of contracts for these vessels were not executed until after passage of the renegotiation statute. In neither case had the contractors or the Navy Department had any experience [144] with building these new types of vessels, and original costs were naturally high, because specifications were constantly changing on the early vessels. No contracts for destroyer-escorts were made prior to passage of the renegotiation statute. Work had been begun, however, on several of the vessels, and general agreement on an estimated cost of \$3,300,000 per vessel was reached in the first part of 1942. All of the contracts for these ships except one was made on a cost-plus-a-fixed-fee basis, and the resulting actual costs of the ships indicate the difficulty of arriving at a fair estimate for an item which has never been made before. Actual costs under eight contracts varied from \$1,440,198 per vessel to \$2,667,583 per vessel (the next highest being \$2,348,578). The total fees fixed on the eight contracts amounted to 11.87% of the actual cost. Under the single fixed-price contract, which

provided a unit price of \$3,500,000, actual unit costs amounted to \$1,809,644, or a profit without renegotiation of 93.4%. As I have earlier indicated, the contractor who took work on a fixed-price basis was entitled to cushions for the many contingencies which might arise and wipe out his profits. There was a definite agreement with respect to the destroyer-escort contracts that as costs were more accurately determined, prices and estimated costs would be adjusted accordingly. The Navy Department was in no position to insist upon the elimination of cushions from the price of a ship which had never before been built, with all of the uncertainties as to costs facing the contractor.

44. With respect to propulsion machinery, I shall repeat an example which was submitted by Secretary Knox to the Congress in April, 1942.¹ Secretary Knox said: [145]

“For example, one of our suppliers with whom we had a contract for 200 destroyer turbines produced the first turbine on our designs at a cost of \$2,559,000, which was very substantially above what that company’s engineers had estimated the cost would be. After the production of 15 turbines, through economies of operation and increased efficiency, this cost was reduced to \$607,000 per turbine. It is now estimated by the company that it will not be until after completion of the seventy-second turbine that the cost will drop to the figure estimated

¹ Hearings before the House Naval Affairs Committee on H.R. 6790, 77th Cong., 2d Sess., April 16, 1942, page 2922.

in quoting to the Navy the contract price of \$300,000 per turbine. This latter cost the company believes will be stable."

ii. Bureau of Ordnance

45. During this period in question, a very large amount of ordnance items were procured under contracts made by the Bureau of Supplies and Accounts. Expenditures by the Bureau of Ordnance increased from \$377,000,000 for the fiscal year 1941, to \$1,915,000,000 for the next fiscal year and \$3,634,000,000 for the fiscal year 1944.

46. Typical of the increase in volume of ordnance procurement is the jump in production under Navy contracts of one antiaircraft gun from approximately 1,000 in the last half of 1941 to about 10,500 in the first half of 1942; another gun jumped from 300 to 1,000 over the same two periods (top production of this item was reached in the second half of 1943 with 3,800 production). Production of Navy ammunition multiplied many times over in 1942.

47. The progressive reductions in prices of two types of antiaircraft guns which had not prior to the present emergency been manufactured in this country is most striking. These guns have been manufactured [146] for the most part by former automobile manufacturers, who had obviously had no prior experience in their production. The Oerlikon gun (20 mm.) with one type of mount was manufactured under one contract made September 9, 1941 for a price of \$7,531.42 per gun; under a contract

dated January 20, 1943 with another manufacturer, its price had been reduced to \$4,519.97, with a still different type of mount, a contract for the Oerlikon guns dated September 22, 1942 specified a unit price of \$6,330; the later contract with the same manufacturer dated May 5, 1944 had brought the price down to \$3,666. This same type of gun was made without mounts under a contract dated June 8, 1942, fixing a unit price of \$4,958.50; the present contract with the same manufacturer dated May 5, 1944 specifies unit prices ranging from \$2,133 down to \$1,708 as production increases.

48. The Bofors gun (40 mm.) prices show equally astonishingly decreases. The original contract dated January 7, 1942 specified a unit price of \$4,288 (without mounts); the later contract with this manufacturer dated November 11, 1943 brought the price down to \$2,510.

49. Prices of 20 mm. and 40 mm. projectiles have come down to about 50% of the original prices. These items are items as to which the changes in specifications have not presented the problem present with respect to many naval munitions. Quantities produced under Navy contracts have multiplied many times over during the past three years, and the price reductions may be attributed in large part to increases in volume. Production of the 20 mm. shells was begun in June, 1941 under eight contracts specifying unit prices which varied between 21.5c and 25.23c per shell; the most recent contracts in January and May of 1944 specify prices from 11.2c to 14.46c per shell. Similarly, [147] production of

40 mm. projectiles began in June and July, 1941 under eight contracts with prices ranging from 64c to 84c per unit; the latest contracts, executed in August and November, 1943 and September, 1944, provided payment of between 43c and 50c per shell.

50. Prices of other ordnance items have indicated how difficult it is to arrive at a price under the original contracts. One model of gunsight has dropped from \$2,638.29 to \$1,571.19. A case for depth charges which originally cost the Government \$15.07 was later reduced to \$10.31. Three-inch gun-barrel forgings were priced at \$1,580 under the original contract of May 5, 1941; under the contract dated November 21, 1942, the price had gone down to \$1,000.

iii. Bureau of Supplies and Accounts

51. This Bureau purchases all of the standard supplies, hardware, clothing, subsistence items and the like. The Bureau both prepares the specifications and writes the contracts for most standard supply items — hand tools, repair materials, furniture, stock items and the like. In 1941 and 1942 the Bureau of Supplies and Accounts also wrote a great many contracts for the other Bureaus, which drew up the specifications for the items to be procured, negotiated the price, and then sent a “requisition” covering the procurement to the Bureau of Supplies and Accounts to be written up in contract form.

52. Total expenditures of the Bureau (for items as to which it both prepared the specifications and wrote the contracts) increased from \$563,000,000 in

fiscal 1941 to \$1,409,000,000 in fiscal 1942 and to \$6,127,000,000 in fiscal 1944. These figures include expenditure of very substantial amounts for pay, subsistence and transportation of naval personnel. A very large [148] proportion in dollar amount of the Bureau's total procurement consists of petroleum products.

53. The prices under Navy contracts of most of the subsistence items and clothing items are so closely related to material costs that volume procurement does not have any appreciable effect upon the prices. I do not therefore present any examples of purchases of either subsistence or clothing items.

54. I shall cite several examples of reductions in the prices of some standard stock items largely as a result of purchasing in large quantities. Thus, twist drills are purchased under contracts for hundreds of thousands of dollars; the unit prices for these drills in different sizes and specifications vary from 8 or 10c to several dollars. Prices under a 1944 contract with one manufacturer for assorted lots of drills were $22\frac{1}{2}\%$ less than prices under a 1942 contract with the same manufacturer. Another item of hand tools—hand taps—are purchased in a very wide variety of sizes and prices. Prices under a 1944 contract for hand taps show a decrease of 20% under the prices specified in a 1942 contract with the same manufacturer.

56. Comparison of prices of sisal rope of a certain specification under two contracts with the same manufacturer shows the following unit prices:

Size of Rope	Price per pound	
	1942 contract	1944 contract
3/4"	\$0.195	\$0.1835
1 1/8" .....	.19	.1763
1 1/2" .....	.1825	.1619
4 1/2" .....	.175	.1547
8" .....	.175	.1547

The differences per pound are in cents and fractions of cents; but as the contracts involve several [149] hundreds of thousands of pounds of rope, these differences become quite large in total.

56. The difference is even more substantial in the case of steel cable. One of the early contracts, made in 1941, specified a price for certain 1/8" steel tow cable of \$0.051 per foot; the contract for the same type of cable with the same manufacturer in 1944 provided a price of \$0.037 per foot—a decrease of \$0.014 per foot, or 28%. The later contract required delivery of 30,000,000 feet of cable, so that the total decrease from the original price amounted to \$580,000.

57. Paint brushes under two contracts about 10 months apart (both executed in 1944) with the same manufacturer decreased from \$2.95 to \$2.61 for one size, from \$2.67 to \$2.34 for another; again, the difference is substantial under a contract for 105,578 brushes.

58. Perhaps a comparison of prices of nuts and bolts under a 1943 contract and a 1944 contract will bring home as cogently as any other comparison the difficulty of close pricing on small standard items. Under the earlier contract, the price for one 1/2" by 5" bolt and nut was \$2.86 per hundred, while the

price under the later contract was \$2.12 per hundred; the prices for a $\frac{3}{4}$ " by 6" bolt and nut were \$7.51 per hundred as compared with \$5.30 per hundred. Even more striking is the difference between the prices for a 1" by 5" bolt and nut—\$14.90 per hundred under the first contract, and \$10.10 under the second.

iv. Bureau of Aeronautics

59. All contracts for aircraft and aircraft components during 1941 and 1942 were drafted and executed by the Bureau of Supplies and Accounts, although prices and terms under these contracts were negotiated by the Bureau of Aeronautics. Expenditure of appropriations [150] for which the Bureau of Aeronautics was responsible increased from \$194,000,000 in fiscal 1941 to \$1,052,000,000 in the next fiscal year, and \$4,696,000,000 in fiscal 1944. Total aircraft accepted (reflecting earlier contracts made) increased 122% from the first half of 1941 to the second half of 1941; acceptances in the first half of 1942 were 210% of acceptances in the preceding six months; and the second half of 1942 saw acceptances more than 200% of those for the first half of that year.

60. The contracts for airframes during this period were, with one exception, all cost-plus-a-fixed-fee contracts. They were invariably long-term contracts, in general extending over 18 months or more. The airframe manufacturers required cost-plus-a-fixed-fee contracts at this time, for their margin of capital in relation to total business was so small that

they could not afford to incur any risks. For example, the Grumman Company had a capital of \$5,000,000, yet its contracts with the Navy approximated half a billion dollars.

61. In the contracts for both airframes and engines, innumerable changes in specifications are made during the life of the contract.

62. One cost-plus-a-fixed-fee contract for torpedo bomber frames was let on March 23, 1942, at an estimated unit cost (plus fee) per plane of \$101,863. This same contract was later converted into a fixed-price contract providing for incentive payments as reductions were made below specified costs, and as of September 30, 1944, the unit redetermined price was \$58,050. A cost-plus-a-fixed-fee contract for scout bomber frames was made on February 2, 1942, at an estimated unit cost (plus fee) of \$34,019 per plane; the present contract for the same frames is on the basis of \$30,160 estimated unit cost. Finally, a contract [151] made May 23, 1942, on a cost-plus-a-fixed-fee basis provides an estimated unit cost of \$63,985 for fighter frames; the most recent contract for these frames (fixed-price adjusted contract) calls for a unit price of \$39,000.

63. Similar decreases are evident in the procurement of engines and propellers. Prices under 1941 and 1942 contracts for three different types of engines and two types of propellers, and prices under more recent contracts for the same articles may be compared as follows:

	Old Contract			Latest Contract		
	Date	No.	Unit Price	Date	No.	Unit Price
1st Type Engine	9/10/41	204	\$14,500	12/29/43	439	\$11,200
2nd Type Engine	7/29/41	2,293	13,151	12/29/43	400	11,051
3rd Type Engine	7/14/41	80	6,522	12/29/43	1,400	5,848
1st Type Propeller	4/ 4/42	259	1,081	12/23/43	583	878
2d Type Propeller	3/30/42	248	2,266	12/29/43	3,375	1,880

64. The procurement of aircraft components likewise shows striking reductions in contract prices as the items are produced in greater quantities and as mechanical problems are surmounted. The following table shows the reductions in prices which have been effected for some items:

	Old Contract		Latest Contract	
	Date	Unit Price	Date	Unit Price
Motor Alternator	4/27/42	\$280.00	5/15/44	\$173.00
Starter—1st type	3/ 1/42	370.00	3/ 4/43	333.00
Starter—2nd type	2/ 2/42	355.00	12/ 2/43	290.00
Generator	9/11/41	343.00	7/11/44	229.00
Navigational Watch	5/28/41	30.25	3/23/44	28.45
Oil Pressure Gauge	10/16/41	2.35	11/10/43	1.95
Compass	8/22/40	43.50	4/13/44	35.72

v. Bureau of Yards and Docks

65. The expenditures of the Bureau of Yards and Docks increased from \$412,000,000 in the fiscal year [152] 1941 to \$1,076,000,000 in the fiscal year 1942, and \$2,265,000,000 in fiscal 1943. The Bureau's work reached its peak in the second half of 1942, when some \$1,768,625,000 of work was reported completed on projects under the supervision of the Bureau of Yards and Docks. The great bulk of this work was done under contracts which had been made prior to passage of the renegotiation statute—indeed, many of them were made in 1939, 1940

and 1941, when some of the large contracts for base projects and advance bases had been let. The Bureau of Yards and Docks supervises construction of industrial facilities under the facilities contracts made by the other Bureaus.

66. The peak in the making of construction contracts and the peak of construction thereunder was reached in 1942. Commitments for all types of facilities (industrial and non-industrial) for the first half of 1942 totaled \$2,742,100,000, for the second half of 1942, \$1,420,400,000; expenditures for work completed in these two six-months' periods were \$1,275,000,000 and \$2,190,000,000, respectively. The bulk of facilities contracts executed in the last six months of 1941 and the first four months of 1942 extended beyond the date of passage of the renegotiation statute on April 28, 1942.

67. It has been estimated that roughly 80% in dollar volume of construction contracts and extensions thereof made by the Bureau of Yards and Docks in fiscal 1942 required over 8 months to perform. Most of the very large construction contracts for construction of new bases extend over more than 12 months. It is of course impossible to compare costs or prices of different construction jobs, although prices of construction materials may be compared.

68. As to items procured by the Bureau of Yards and Docks, I shall cite as examples two items—pontoons [153] and floating dry docks. The pontoon program was started near the end of 1941 with

an order for a few thousand pontoons; the number contracted for multiplied over six times in 1942, and increased in 1943 far beyond what anyone had anticipated. The Bureau procures two major types of pontoons, one of which is procured in numbers about 9 times as large as the other type. Prices have come down as follows:

	1st type	2nd type (procured in the larger quantities)
1941 (includes development costs)....	\$440	\$660
1942	335	370
Late 1942	---	250
1944	270	200

Construction of floating dry docks began in 1941. These were an entirely new item, and extensive changes in specifications and design were made during the life of the early contracts. All of these contracts extended beyond April 28, 1942.

II. ACTION BY THE NAVY DEPARTMENT WITH RESPECT TO EXCESSIVE PROFITS

69. The Navy Department in 1941 and the early part of 1942 had only begun to build up machinery for the purpose of ascertaining and recapturing excessive profits under its contracts. I have pointed out the enormous increase in the number of contracts and in the volume of Navy procurement during this period, and the impossibility of acquiring experienced personnel forthwith, to negotiate the best possible prices for the Government. During the period in question [154] (the latter part of 1941

and the first four months of 1942), the Navy Department discovered that some of its contractors were earning very large profits. We endeavored to correct the situations which came to our attention. It proved impossible then to achieve close initial pricing under most Navy contracts. After our experience of the last several years I am convinced that it will always be impossible in wartime to arrive at close prices for munitions, when the Government is uncertain as to the types or quantities of munitions which are needed (and the exigencies of war are such that we are almost never certain as to types and quantities).

a. 1941 Investigations

70. In the first half of 1941, both the House Naval Affairs Investigating Committee and the Truman Committee sent out questionnaires relative to profits to manufacturers and shipbuilders holding Navy contracts. The Truman Committee in June, 1941, conducted hearings upon costs and profits under ship contracts and contracts for ship repair and alteration. These investigations brought out the fact that very large profits were being enjoyed by some contractors; the Truman Committee was particularly concerned with profits under ship repair and alteration contracts. Before these Committees had published any reports, however, the Navy Department made efforts to correct some of the contract prices, particularly under the ship-repair contracts. The first step was to make sure that the Bureau of Internal Revenue would treat a

voluntary refund by a contractor as a reduction in his contract price and in his taxable income; in response to inquiries by the Navy Department, the Treasury Department in September, 1941, indicated that for tax purposes it would so regard such a refund, provided the original contract was modified in writing to indicate [155] the reduced price. Thereafter the Treasury further indicated that a refund made after completion of performance of the contract would likewise be regarded for tax purposes as a reduction of gross income.

71. Mr. Forrestal (then Under Secretary) and Rear Admiral Samuel M. Robinson (then Chief of the Bureau of Ships) in September of 1941 requested the Compensation Board to investigate the cost records of contractors who were to complete ships under Navy contracts in 1941 and the first six months of 1942, and to determine what the probable profits in the construction of those ships would be. The Compensation Board was an administrative agency which had been set up by the Secretary of the Navy in the first World War to review costs under cost-plus contracts, and to advise the Secretary generally on amounts claimed by contractors under Navy contracts. Its functions in reviewing costs under contracts had been taken over largely in late 1941 by the Cost Inspection Service of the Bureau of Supplies and Accounts (the Cost Inspection Service was given complete responsibility to inspect costs under cost-plus-a-fixed-fee contracts, except those made by the Bureau of Yards and Docks, by a directive of the Secretary dated

February 9, 1942). The Compensation Board planned to have its accounting branch, the Cost Inspection Board, go over the cost records of contractors under outstanding vessel contracts and attempt to estimate what the profits would be under such contracts. It was anticipated that in cases where the profits appeared to be excessive, the Bureau of Ships, acting in conjunction with the Compensation Board, would endeavor to persuade the contractors voluntarily to reduce prices. The Bureau of Ships had estimated that by limiting the investigation to contracts of vessels to be [156] delivered prior to July 1, 1942, performance would be close enough to completion so that a fairly accurate estimate of anticipated profits could be made. Both the Compensation Board and contracting representatives of the Bureau of Ships felt that it would be wise to persuade contractors in advance to modify their contracts to allow readjustment in prices to eliminate excessive profits, if possible—a forerunner of the renegotiation clause.

72. The Compensation Board was unable to early this project to completion. It did begin investigation of costs under the vessels contracts, but the outbreak of war and the transfer of the bulk of its cost inspection activities to the Bureau of Supplies and Accounts cut short the study of excessive profits of naval shipbuilders. The Bureau of Ships, aided by the Cost Inspection Division of the Bureau of Supplies and Accounts, late in 1941 began to carry forward certain of the work projected by the Compensation Board, in that it commenced negotia-

tions with a number of shipyards under the ship repair and alteration contracts for revision of the contract billing rates.

73. At this same time, the House Naval Affairs Committee, acting as a Special Committee to investigate the national defense program, pursuant to House Resolution 162, approved April 2, 1941, was undertaking its study of excessive profits under Navy contracts. The Naval Affairs Committee had in April, May and June, 1941, obtained a list of all contractors with the Navy Department, and it sent out to these contractors a general questionnaire, which required the submission of extensive and explicit information on costs of performance of Navy contracts and profits thereunder. As responses were received from the contractors, supplemental questionnaires drawn to [157] elicit information as to a particular industry, were issued to contractors in different industries. The Committee stated that it had in the second and third quarters of 1941 sent questionnaires to 6,899 contractors holding 16,463 contracts. The questionnaires, which required a considerable amount of effort to fill out, aroused a good deal of protest, and also increased interest in excessive profits on the part of both the contractors and the Navy Department. (These questionnaires and the responses thereto are summarized in the Committee's report issued January 22, 1942, H. Rept. No. 1634, 77th Cong., 2d Sess.)

74. By October of 1941 Representative Vinson, Chairman of the House Naval Affairs Committee, felt that the Committee had acquired sufficient data on profits of Navy contractors to indicate the need

for corrective legislation. While he indicated to the Navy Department that the questionnaires returned to the Committee showed that most of its contractors were realizing only a fair profit, he stated further that profits under certain contracts represented an "unconscionable percentage" of the contract price. Therefore, on October 7, 1941, he introduced H. R. 5787 (87 Cong. Rec. 7713) to provide for the recapture of all profits under Government contracts in excess of 7% of the cost of performance thereof. At about this same time, another bill (H. R. 5739) was introduced imposing a flat percentage limitation of profits under war contracts—in this bill 8% of the contract cost. The Navy Department was opposed at this time and later to the revival of any percentage limitation of profits, such as that contained in the Vinson-Trammell Act. It had had the experience under the Vinson-Trammell Act with such a type of profit limitation, and the officials responsible for procurement in the Department were confident that any [158] reenactment of such a limitation would impede the procurement programs.

75. Some consideration was given within the Department in the last several months of 1941 to the best method of limiting profits by administrative action. The only concrete results of this consideration were the readjustments effected by the Bureau of Ships in payments under the ship repair and alteration contracts. These contracts were in effect requirement contracts—i. e., the contractor agreed to perform, for compensation based upon

reimbursement of cost of materials and a fixed price per man-hour of work, all orders for ship repair or alteration work which might be placed with him by the Navy Department. Around the 1st of December, 1941, the Bureau of Ships began to seek voluntary reductions in rates from the shipyards. Between December 1, 1941, and April 1, 1942, the Bureau in effect renegotiated 27 ship repair and alteration contracts, representing a very substantial portion of the outstanding number of such contracts. At hearings before the Senate Naval Affairs Committee on profit limitations late in January and early in February of 1942, Captain Claud A. Jones (Assistant Chief of the Bureau of Ships) indicated that the Navy had recovered about \$2,000,000 in profits by renegotiation of the ship repair and alteration contracts.² This figure does not, of course, indicate the savings which would accrue in the future by reason of the renegotiation of such contracts.

76. The work of renegotiating the prices under these contracts was spurred by publication on January 15, 1942, of the Truman Committee's report, which covered among other things profits under Navy contracts for shipbuilding and ship repair and alteration. On [159] January 22, 1942, the House Naval Affairs Investigating Committee issued its first report on the defense program, which

² Hearings before the Senate Naval Affairs Committee on H. R. 6355, S. 2027, 77th Cong., 2nd Sess., Page 7.

dealt extensively (409 pages including appendices) with the matter of profits under Navy contracts.³ While the Committee noted that average profits under the contracts let by the several Navy Bureaus were not too much out of line, it did indicate some examples of extremely high profits. These profits were unduly high despite the excess profits tax. The whole report dealt with profits in terms of percentages of the contract price. It pointed out that the percentage of profits on sales was greater under uncompleted contracts than under completed contracts, and "that as the defense program progresses, the profits to the contractors are increasing and will tend to increase unless steps are taken to halt the trend." Much emphasis was placed upon this report by the Navy officers responsible for procurement. It also received very wide publicity at the time; the newspapers were full of editorials about the prevention of war profiteering, and the procurement officials of the Navy Department spent a considerable amount of time over the next several months in seeking to devise some more effective means of administratively limiting profits under Navy contracts.

b. Study and Suggested Solutions within the
Navy Department, February-April, 1942

77. From the end of January, 1942 on, the efforts of Navy procurement officials to find some solution to the problem of policing of costs and

³ House Report 1634, 77th Cong., 2nd Sess.

profits were redoubled. While no formal organization had been set up to deal with the matter, several groups were devoting most of their time to an investigation of ways and [160] means for limiting profits. The procurement personnel of the several Bureaus worked closely with the investigating personnel of the House Naval Affairs Committee, and were instrumental in suggesting to the committee most of the contractors whose profits were so large as to merit further investigation. The Department was during this same period attempting to work out a sound organization to handle the entire procurement problem, let alone the matter of war profits. It was on January 30, 1942, that the efforts towards coordinating the divergent procurement activities of the several Bureaus culminated in the establishment of the Office of Procurement and Material in the Secretary's office.

78. At the Under Secretary's request I devoted a large part of my efforts during the months of February, March, and April, 1942, to working out some means of curbing profits under our contracts which would not interfere with the more important objective of obtaining the munitions and supplies required by the Fleet. I spent a great deal of time during this period in discussing this problem with representatives of the Procurement Branch in the newly formed Office of Procurement and Material, the contracting branches of the several Bureaus, and the accounting personnel in the Bureau of Supplies and Accounts. During these three months the Under Secretary also brought into the Department

several men with wide business experience who looked into the entire matter of profits under Navy contracts and who subsequently became members of the Price Adjustment Board (established several weeks prior to passage of the renegotiation statute). The problem of the right way (if there were any "right" way) of handling the problem was, however, still very much in the formative stage—it was not then possible to set up any [161] more definite organization to handle the matter of closer pricing and excessive profits. In February we held several discussions with representatives of the Army procurement services as to the best cure for excessive profits, and considered a proposal to include in war contracts clauses under which the contractor agreed to consider adjustment or renegotiation of the contract prices.

79. Early in March, I submitted to the Under Secretary, on behalf of the Navy group which had been studying the problem, some tentative conclusions. It was the consensus, first, that the Navy Department must continue to rely upon the "profit motive" as an important factor in inducing war production, but that nonetheless, excessive profits had a bad effect on public and military morale and also tended to encourage demands for wage increases and decreases in labor efficiency. With respect to the proposal to limit profits to a flat percentage of the cost of performance of contracts, it appeared probable that industry would insist upon a floor under losses if it were to be subjected to a ceiling upon profits. This floor under losses could

be accomplished only under a cost-plus type of contract, which was expensive to supervise and audit, tended to reduce efficiency, and often permitted very high profits on a yearly basis; and the 7% limitation on the fee allowed under such contracts, while low for some businesses, permitted very high returns for other businesses. The amount of manpower and effort required to audit such contracts or to administer the flat percentage type of limitation under fixed-price contracts would be enormous and probably could not be drafted if this limitation were put into effect. With respect to excess profits, it was our position that corporations must be permitted to retain some portion of their profits in order to [162] preserve the influence of the profit motive and in such event the amount of profits before taxes in view of the extraordinary ballooning in some industries was often so large as to leave excessive profits even after taxes. There was no easy answer to the problem of effective profit control. It was my view at that time that we should attempt to do as much as we could by starting at the very beginning—in the negotiation of contract prices. The Government should be represented in such negotiations by experienced and skillful negotiators who would endeavor to see that the maximum of effort was produced at the right price. We realized then that in the light of all of the imponderables, even skilled negotiators would be unable to achieve close pricing in many instances. It was recommended to the Under Secretary that experienced price negotiators be placed in each of the

contracting Bureaus. This suggestion was discussed at considerable length in various meetings and bore fruit several months later in the establishment of a Price Negotiation Section in the Bureau of Supplies and Accounts, which was ultimately extended to all of the Bureaus of the Navy Department.

80. At about this same time (early March, 1942) as a result of our several discussions within the Department, consideration was given to a proposed directive to be signed by the Secretary with respect to the allowance of reasonable profits on fixed-price negotiated contracts. It was proposed that prices be fixed to allow a profit of 6% generally, but up to 10%, of the estimated cost of the contract, to be determined on the basis of cost data and financial statements submitted by the contractor—in short, an embodiment in each contract of the Vinson-Trammell type of limitation, applied in advance. The directive was discussed in considerable detail on March 13, 1942, by representatives [163] of the several Bureaus, the Special Assistant to the Under Secretary, Vice Admiral Robinson (Chief of the Office of Procurement and Material), and myself. We were agreed at this meeting that the proposed directive would tie the Navy Department completely to the percentage limitation of profits concept, with all of its inherent deficiencies. We therefore decided that we would not recommend that any such directive be signed by the Secretary at this time, and that we would attempt further to devise some effective means of control of profits within the Department. One feature of the proposal was

revived several weeks later—namely, the requirement that the contractor submit statements as to the estimated cost of performance of his contract and other financial data in connection with the performance of Government contracts. Some time thereafter this did become the standard practice.

81. At this same time the War and Navy Departments and the War Production Board had been working upon the establishment in each of the three agencies of cost analysis sections, which would be able to point out profit danger spots and suggest administrative remedies therefor. On March 17, 1942, representatives of the Office of Procurement and Material who had participated in these discussions circulated a proposed outline of procedure for the establishment and workings of such sections. This suggestion provided for the close coordination of the proposed cost analysis sections in the three agencies, and provided further that the War Production Board would attempt to supply a check on the selection of contracts for cost analysis so that the program would not put an unmanageable burden upon the accounting offices of the three Departments. After further discussion of ways and means, the cost analysis sections were set up about [164] three weeks later. The War Production Board was to function primarily in analyzing the cost reports prepared by the War and Navy Departments.

82. In the latter part of March Messrs. Kenneth H. Rockey and Sylvan Coleman came into the Department at the Under Secretary's request to

study the whole matter of excessive profits and closer pricing. Messrs. Rockey and Coleman went over the rather substantial data which we had by this time accumulated and spent considerable time with the contracting officers of the several Bureaus in reviewing contracting procedures and the methods then available for determining whether or not excessive profits were being earned. Both of them took a very active part in the discussions which were then occupying most of the time of the group studying the matter of excessive profits. When the Navy Price Adjustment Board was established about April 20, 1942, Mr. Rockey was made its Chairman and Mr. Coleman was made a member of the Board.

83. In the course of our study, some of the cases of excessive profits enjoyed by subcontractors were brought to our attention. We learned of several instances in which the prime contractor with the Navy Department had given subcontracts to one of its subsidiary companies, and had included in its cost figures under the prime contract allowances for profits of subsidiary contractors. We sought to require representations by the prime contractor which would prevent any repetition of such practice. Of course, we recognized that any scheme of percentage-profit limitation tended to favor high profits for subcontractors; the prime contractor would not be interested in keeping subcontract costs or prices low, since the higher such costs or prices were, the higher the base on which his percentage of profits would be figured. Also, there were [165] some in-

stances where work was subcontracted directly and the fee of the subcontractor was added to the fee of the prime contractor to make for double profits on the same work.

84. During the last week of March, 1942, the House Naval Affairs Investigating Committee held hearings on excessive profits being earned by several large Army and Navy contractors. These hearings were extensively reported in the newspapers, and the large profits earned by the Continental Motors Company and of Jack and Heintz received particular attention. The Naval Affairs Committee had received most of its data on these contractors from a joint audit which had theretofore been undertaken by the Army and Navy. The hearings had the helpful result of producing a number of meetings between Army and Navy representatives for joint consideration of the best means of limiting excessive profits. At such a meeting on March 25, 1942, it was concluded that each Department should have available an organization to which would be reported all cases wherein it was suspected that contractors were earning excessive profits. The meeting envisioned that these organizations would function about as follows:

a. All procurement officers would be advised of the establishment of the two organizations, and requested to refer to them for further investigation cases of excessive profits.

b. A conference would be called between the contractor and representatives of all Government agencies holding contracts with such contractor. At

this conference, the profits would be considered with a view to obtaining for the Government a return profits deemed excessive or a reduction of the contract price by the amount of such profits, whichever might be appropriate. [166]

c. The meeting contemplated that in the cases of recalcitrant contractors, resort might be had to compulsory orders under Section 9 of the Selective Training and Service Act; and further that in appropriate cases full publicity would be given to the excessive profits and the action taken.

The March 25th meeting further determined that immediate action along the lines indicated would be taken jointly by the services in the case of Continental Motors. In general, the War and Navy Departments were agreed that each case should be dealt with on an individual basis, although at the outset it might be advisable to approach a group of contractors (perhaps those mentioned at the hearings of the House Naval Affairs Investigating Committee) and to deal with them in a body. It was agreed that the proposed action would be reported to the Congress to indicate the bona fide efforts being made by the War and Navy Departments to achieve answers to the problems of excessive profits. This meeting really represented the birth of the Price Adjustment Boards.

85. The War and Navy Departments thereafter discussed with the War Production Board this proposal to set up bodies to investigate war profits. Growing directly out of these discussions was the

proposal that a Presidential Board be appointed to serve throughout the war for the purposes of studying the experience of other nations as to profit limitation, formulating a comprehensive program for the prevention of excessive profits, suggesting legislation and procurement policies as deemed appropriate, and dealing with special difficult cases. The proposal contemplated that Congress, the Army and Navy and other war procuring agencies would be able to look to such Board for guidance and advice. [167]

86. By the time this matter was brought up for consideration, however, H. R. 6790, the revival of the Vinson-Trammel percentage limitation, had been introduced (March 16, 1942); and Representative Case had introduced his amendment to H. R. 6868, providing for the renegotiation of contract prices to eliminate all profits above 6% (March 28, 1942). These proposals were discussed with representatives of the Army and the War Production Board, and representatives of the Navy presented to the House Naval Affairs Committee and to the Senate Finance Committee our views with respect to them, and commented upon the several revisions of the renegotiation proposal which were submitted to us.

87. The passage of the Second War Powers Act, 1942, on March 27, 1942, afforded an additional weapon to the Navy Department and the other war procuring agencies in the investigation and determination of excessive profits. Title XIII of this Act allowed the agencies, when so authorized by the President, to inspect and audit the books and

records of their contractors and to require such financial data as they desired. The President, by Executive Order 9127 dated April 10, 1942, delegated this authority of investigation and audit to the procuring agencies, subject to certain conditions. The Departments were enabled to go into the plant of any contractor and require the submission to them of all information as to profits.

88. The Cost Analysis Section and the Price Adjustment Board were formally organized in the Office of Procurement and Material about April 20, 1942, and were specifically called to the attention of all procuring officers of the Department by a memorandum circulated on April 24, 1942. [168]

89. The informal group which had preceded the formal establishment of these two organizations, the Bureau of Ships and the Cost Inspection Division of the Bureau of Supplies and Accounts, had meanwhile in the first four months of 1942 continued to readjust and renegotiate contract prices. The accomplishments of the Navy Department in reducing prices up through June of 1942 were summarized in the report of the House Naval Affairs Investigating Committee of July 22, 1942.⁴ The Committee had obtained the names of specific contractors investigated and a great deal of the data on the excessive profits which they were enjoying, from the Departments. The Committee included in its report a summary of the "actual monetary savings to the Navy Department" as a result of renegotia-

⁴ H. Rept. No. 2371, 77th Cong., 2d Sess., pp. 26-32.

tion of contracts. It indicated that the Navy had effected such savings to the extent of some \$88,000,000. While the Committee did not so indicate, the great bulk of this amount constituted reductions in contract price rather than returns of cash received by the contractors. Furthermore, as the Committee did point out, the renegotiations effected at that time would later show substantial results in lowering prices on new contracts for the munitions for which the original contracts had shown excessive profits. With respect to the ship repair and alteration contracts, the Committee remarked that refunds under these contracts amounted to \$7,000,000 (which is to be compared with the \$2,000,000 which had been recovered by the end of January, according to Captain Jones' testimony). As the volume of ship repair and alteration work had increased under these contracts, profits had expanded rapidly under rates which had been fixed in the absence of any adequate experience in this type of work. Under contracts [169] of this type, the Bureau of Ships had been fairly successful in renegotiating profits to allow no more than 10% of costs (as compared to an average profit on such contracts prior to their readjustment of 30% of their cost of performance).

90. I am unable to present any concrete figures from the Navy Department as to the total cash refunds of profits by Navy contractors prior to April 28, 1942. Apparently all of the cash refunds were collected by means of deductions from vouchers; no record had been kept of any such deductions, and

it would be an interminable undertaking to examine the vouchers under each contract in the anticipation that they might reveal voluntary reductions in price. In addition, any recapitulation of the cash refunds would not show the whole picture, for most of the savings to the Government in the elimination of excessive profits were effected by means of price reductions.

c. Consideration of the Percentage Profit Limitation Proposals

91. Meanwhile, the Congress had been considering several proposals to impose a percentage limitation of profits upon Government contracts, and there appeared at the time to be a very strong chance that such a method of limitation would be enacted by the Congress. These proposals, to which the Navy procurement officers were unalterably opposed, naturally spurred the efforts within the Department to arrive at a solution to the profit limitation problem. On March 16, 1942, there had been introduced in the House H. R. 6790, which proposed among other things to limit profits on all Navy contracts to 6% of the cost of performance thereof. The bill was referred to the House Naval Affairs Committee, which held a number of hearings upon it in late March and April 1942. [170]

92. Both Mr. Forrestal and Col. Knox testified with respect to H. R. 6790. Mr. Forrestal called attention to the vast amount of auditing work which would be necessary to enforce any such limitation, and discussed our experiences under the Vinson-

Trammell Act. The Secretary, who testified on April 16, 1942, brought out the immense variety of factors which affected profits under a particular contract and the impossibility of any single cure for excessive profits applicable to all contracts. He pointed out one very important consideration which the Congress had not thus far emphasized—the importance of reducing costs to the Government as well as profits. As he suggested, high costs and reduced profits often went hand in hand, and high costs could be much more expensive to the Government than high profits.

93. The Navy had had some experience in the difficulties of obtaining good accountants and auditors to handle the growing dollar volume of cost-plus-a-fixed-fee contracts. In early 1942, there were in the Cost Inspection Service of the Bureau of Supplies and Accounts, which audited costs under these contracts, some 2700 accountants (most of whom were stationed outside Washington); in addition there were a substantial number of accountants in the Bureau of Yards and Docks, which audited its own construction contracts. H. R. 6790 proposed to have costs under Government contracts determined by reference to Treasury Decision 5000 (the regulation under the Vinson-Trammell Act), which was then used as a guide for auditing costs under the cost-plus-a-fixed-fee contracts. The determination of costs was a burdensome and time-consuming job, and there were substantial differences of opinion as to what items were properly allowable costs. The complete post-audit of expen-

[171] ditures under the cost-plus contracts by the General Accounting Office, after audit by the services, further complicated the difficulties of administering the cost - plus - a - fixed - fee contracts. It seemed clear that there would not be enough accountants in the nation to scrutinize costs under every Government contract, as contemplated by H. R. 6790, in the same way that costs were scrutinized under the cost-plus contracts.

94. H. R. 6790 was tabled in committee, for the renegotiation bill had been brought to the fore by the Congress. Section 403 of H. R. 6868, as reported out by the Senate Appropriations Committee, contained in subsection (f) a graduated range of percentage limitations to be applied to Government contracts of different size. Representatives of the Navy Department joined the representatives of the other war procuring agencies in discussing this subsection with the Senate Committee, which ultimately agreed that the percentage limitation feature should be deleted.

d. Maximum Price Controls

95. The matter of price controls upon munitions was considered by the Under Secretaries of the Navy and War and the Price Administrator in late 1941. They decided at such time that it would not be necessary to set up any formal machinery for handling differences of opinion between the armed forces and the Price Administrator with respect to prices, but that each problem would be handled as it arose. The situation was changed substantially by

the approval on January 30, 1942 of the Emergency Price Control Act of 1942. The armed services had in the consideration of the bill which became the Price Control Act recommended that munitions be expressly exempted thereunder, but their suggestion [172] was rejected. The possible imposition of maximum price ceilings on munitions pursuant to this Act was a rather unsettling factor in the whole discussion of possible methods for control of profits during the next several months. At the time of passage of the Act, the Price Administrator had not determined upon a policy as to the establishment of ceilings for the purpose of preventing war profiteering and of controlling prices under contractors for war materiel. On the day the renegotiation statute was approved—April 28, 1942—the Office of Price Administration issued its “Big Freeze” order, the General Maximum Price Regulation, and its Machinery and Parts Regulation (Maximum Price Regulation No. 136). The coverage of these regulations included a great many items of completed munitions and almost all components thereof, although certain specified munitions were to be exempted from the price ceilings established under the Regulations. Broadly speaking, the General Regulation fixed the price ceilings by reference to the prices in effect during March 1942, and required specific authority from the Office of Price Administration for the fixing of ceilings where there were no analogous March 1942 prices; and the Machinery and Parts Regulation fixed ceilings by reference to the prices in effect

October 1, 1941, and also required specific authority from the Office of Price Administration in cases where there were no analogous October 1, 1941, prices.

96. The issuance of these regulations precipitated an immediate and prolonged discussion between the armed services and the Office of Price Administration as to the desirability of fixing price ceilings for munitions and their components. As a stop-gap measure, the Price Administrator postponed application of the regulations to sales and deliveries under Army [173] and Navy contracts until July 1, 1942. In the latter part of May 1942, the Under Secretary of the Navy established a liaison office in the Bureau of Supplies and Accounts, which was to integrate the price policies of the Navy Department and the Office of Price Administration insofar as possible.

97. It had been the position of the Army and Navy in all of their consideration of price control that it would be unwise and impracticable to apply price regulations to strictly military and naval equipment, and that attempts to do so ran the risk of impeding procurement of such equipment. It was felt that the services responsible for war procurement must have final power over prices; such services were charged with full responsibility for procuring the articles with which to fight the war, and proper prices might well be an inextricable element in such procurement. In the latter part of July 1942 the Under Secretaries of War and of the Navy notified the Price Administrator that

while they recognized the necessity of adopting all possible means to prevent inflation, they felt that it was necessary to exempt military and naval supplies from the application of price ceilings. The Under Secretaries pointed out the difficulties inherent in effectively applying ceilings to munitions—e. g., the wide variety of conditions and uncertainties faced by contractors, the changes in specifications, inexperience of contractors, necessity of using all contractors and procuring all items regardless of cost. They further pointed out the probable impediment to production and procurement which the imposition of price ceilings would bring about, the undesirability of divided authority with respect to procurement, and the uncertainty and delay which would result from the application of the price regulations to Army and Navy contracts. Finally, they requested that “all [174] articles which are designed and produced exclusively for military uses, and all subassemblies and parts of such articles which are themselves designed and produced exclusively for such military articles” be exempted from price regulation by the Office of Price Administration, with the exception of articles subject to regulation prior to June 30, 1942; that in questionable cases exemption be granted upon certification by the Secretary of War or of the Navy that the exemption was necessary for the prosecution of the war. The Under Secretaries pointed to the authority to renegotiate contract prices under the recently enacted renegotiation statute as a means at their disposal

of controlling excessive profits and preventing inflation.

98. After further consultation, the Price Administrator responded in September 1942 by indicating that he would not extend maximum price control in the area of strictly military goods, provided he received assurances that the Army and Navy would use their powers to control both prices and profits in the exempted areas. He further indicated willingness to consider any requests for exemption of particular items at that time under formal price regulations. The Office of Price Administration agreed not to extend price control to sales of strictly military goods. It was understood that the exact line of demarcation between military and non-military goods would have to be more precisely drawn after conferences among the three agencies. The War and Navy Departments accepted the proposal as drawn by the Price Administrator, and agreed to furnish his Office with such information as it requested on the prices and procedures of the two Departments. Thereafter the armed services did establish divisions which furnished to the Office of [175] Price Administration all information on prices requested by such Office.

99. Prior to the passage of the renegotiation statute, the top Navy officials in charge of procurement had spent a very considerable amount of time in seeking to evolve some answer to the extraordinarily difficult problem of limiting war profits while at the same time executing the vastly accelerated procurement programs.

100. There was virtual unanimity of opinion that the percentage limitation of profits was not a solution to the Navy problem—experience indicated that it was not effective and that it made contractors hesitant to take Government contracts. Indeed, it made many manufacturers want to become subcontractors rather than prime contractors. The limitation of adequate accounting personnel was an even more compelling practical reason for the rejection of this means of profit control. Similarly, we had neither the inclination nor the necessary personnel to extend the use of the cost-plus-a-fixed-fee contracts to fields where in we were able to use fixed-price contracts. We knew from actual experience that exorbitant profits were being earned despite the recoveries under the excess-profits tax. The proposal to subject munitions to price ceilings had been seriously considered by the time of passage of the renegotiation statute, although the matter was not settled until the latter part of 1942.

101. The Navy Department was, then, in early 1942 in the position of opposing the known and theretofore attempted methods of limiting war profits, either because some of them were ineffective or because others would in the opinion of those responsible for procurement seriously interfere with war production. We would quite frankly have preferred at this time to work out our own administrative solution to the problem of limiting profits under Navy contracts, primarily [176] through analysis of costs and closer pricing. The solution proposed by the Congress in the renegotiation statute, however, ap-

peared to us to be a much better method than any alternative statutory method available. In retrospect, I believe that it is the better approach and that our earlier preference would not have solved the problem.

III. NAVY CONTRACT FORMS AND CLAUSES

102. The advent of the negotiated contract completely changed the form of the Navy contract and made necessary the use of much more intelligence and skill in the preparation of contracts.

103. Contracts awarded to the highest bidder after solicitation of competitive bids had all been based upon Forms 32 and 33 prescribed by the Procurement Division of the Treasury Department for all Government agencies. Such forms of contract, with their boilerplate provisions, were satisfactory only for simple deals, and proved quite inadequate for negotiated contracts. The first break away from these restrictive forms came in the preparation of construction contracts and contracts for the construction or installation of industrial facilities (in 1939 and 1940). In developing provisions for the facilities contracts—financing the contractor, purposes for which the facilities were to be used, rights of the parties upon the termination of the emergency period, and the like—it was obvious that the contract would have to be tailor-made to fit the particular arrangement. Furthermore, in the course of drafting these various provisions to

fit the procurement transaction, the boilerplate provisions were scrutinized and were often improved or made more appropriate. The grant of authority to negotiate certain contracts for vessels and supplies (in June 1940) further accelerated the process of [177] critical examination of the contract provisions and the drafting of intelligible new provisions to meet particular needs.

104. After enactment of the First War Powers Act, 1941, and the promulgation of Executive Order No. 9001, the Secretary removed entirely the restrictions of Form 32 in the preparation of negotiated contracts. The Secretary's directive of December 28, 1941, established a new internal Navy procedure for clearing contracts negotiated under the War Powers Act; in addition, it delegated to contracting officers complete discretion with respect to the form of such contracts, except for certain specified provisions required by statute or executive order. Under this delegation of authority, contracting officers were granted complete discretion to make advance, partial, and other payments on account of the contract price, *without limitation as to amount*

" * * * without limitation as to amount and irrespective of any provisions of law as to security, liens (except as [to the lien in favor of the Government as permitted by the Act of August 22, 1911, 34 U. S. C. 582]) or otherwise, except that advance payments should be carefully scrutinized to determine whether such payments are necessary for the satisfactory performance of the contract in accordance with the terms thereof and as much

security by means of controlled accounts or otherwise shall be provided for as may be expedient under the circumstances of each case."

The directive further specified:

"Such contracts [under the War Powers Act] may be made with or without competitive bidding as the respective contracting officers in their discretion may determine. There shall [178] be no limitations or restrictions as to form and substance of such contracts except [the contract clauses required by statute or executive order].

* * * * *

The contracting officers are authorized to select such procedures in making contracts as are deemed best fitted to the purchases involved and the needs of the Navy."

105. At this time all instructions relative to contracts were in the form of individual directives by the Under Secretary to the Bureau Chiefs, who transmitted such instructions to the officers under them responsible for preparing contracts. Since the great majority of Navy contracts were made by the Bureaus in Washington, these directives could be rather informally issued and distributed. In general, they gave a wide degree of discretion to the Bureaus in the preparation of contract provisions. As we began to pay more close attention to prices and the elements which went into prices, it became necessary to issue more detailed instructions relative thereto; it was not until October 1943, however, that we were able to collect the contract directives

in one place, arrange them, and issue them in a loose-leaf volume (the Navy Procurement Directives).

106. I shall summarize very briefly the more or less common Navy contract provisions prescribed in the first several months of 1942 for the determination or adjustment of prices or costs.

i. Changes

107. All Navy contracts included provisions for changes in the work covered thereby. The changes clause in all Bureau of Ships contracts was broader than that in other contracts made by the Navy.

The Bureau of Ships clause provided:

“The Secretary of the Navy, at any time and without notice to the sureties, may make changes in this contract including the General Provisions, the plans or specifications of this contract, within the general scope thereof.”

This type of clause had been in ships contracts since the 1880's. The broad language of the clause had, by construction, been somewhat limited in scope. The clause was eliminated about a year ago, and the ships contracts now contain provisions limiting changes to the work under the contract, as in other Navy contracts.

108. With respect to changes in price upon a change in specifications or in the work under the contract, the more or less standard clause for fixed-price contracts provided that if the changes caused an increase or decrease in the cost of performing the contract, “an equitable adjustment” would be

made and the contract modified in writing accordingly; facilities and cost-plus-a-fixed-fee contracts provided that upon the making of changes "an equitable adjustment of the estimated cost and the fixed fee would be made and the contract modified accordingly." In the event of failure to agree upon a change in the fixed price or fixed fee, the matter was to be decided by the contracting officer pursuant to the disputes clause of the contract. The cost-plus-a-fixed-fee contracts for vessels provided specifically that if the estimated costs were changed as a result of changes in specifications, the fixed fee, which was stated to be about 7% of the estimated cost, should be changed by 7% of the change in the estimated cost.

ii. Payments

109. The contracts provided specific procedures for submission of invoices covering costs under cost-plus [180] and facilities contracts, and for prices of goods delivered under fixed-price contracts. These provisions varied substantially among the different types of contracts.

110. Fixed-price contracts for vessels called for partial payments as construction of the vessel progressed. The provisions for advance payments under fixed-price contracts specified that a lien should be established in favor of the Government on the materials and property acquired by the contractor. In some instances controlled accounts were established, providing a check by the contracting officer upon the advance payments to the contractor; the ad-

vance payments clauses were at this time relatively simple as compared to clauses presently in use.

iii. Insurance and Bonds

111. All contracts required the contractor to carry insurance on the property produced or acquired thereunder, and to carry workman's compensation and other third-party liability insurance with respect thereto. The Government generally undertook to make the contractor whole for losses sustained in excess of the amounts covered by insurance taken out at the direction of the contracting officer.

112. After passage of the War Powers Act, performance and other bonds were largely dispensed with, although they were still required for certain standard supply contracts made by the Bureau of Supplies and Accounts. In any event, the performance, payment and similar bonds had never been of much use to the Navy. It had invariably proved impossible to obtain bonds at any cost in the cases where they were most needed. Generally the cost of bonds was high and the amounts of coverage in the case of large contracts were entirely inadequate to protect the Government. [181]

iv. Patents

113. Whenever patents were involved in the procurement, the standard clause of the Treasury Procurement contracts was used—the contractor agreed to hold the Government harmless against claims for infringement of patents in the performance of

the contract. Some ships contracts contained the further requirement that the contractor not pay any sum for royalties or patent rights not included in the ordinary purchase price of parts embodied in the ships, unless and until duly so authorized by the contracting officer. No real progress was made in the matter of controlling royalties and other payments relative to patents under Navy contracts, and in drafting patent clauses which adequately protected the interests of the Government, until after the Procurement Legal Division was authorized to handle such matters in August, 1942.

v. Termination

114. Navy contracts (except Bureau of Ships contracts) at this time provided that in the event of cancellation for the convenience of the Government, the Navy would pay the contractor for all costs, including a proper allocation of overhead expense to the contract, incurred up to the time of termination, plus an allowance of 6% or 7% profit on all such costs except purchases of materials and unfinished goods, for which the contractor was reimbursed at cost. This provision differed from the clause then used by the Bureau of Ships and the Army, which calculated the profit on the estimated extent of completion of the contract—the contractor was paid a percentage of the total profit equal to the percentage of completion. The use of any clause was a vast improvement over the practice in the first World War, when contracts did not contain any termination clauses. [182]

115. Navy contracts, other than ships contracts, also had included clauses authorizing termination for default, corresponding to the delays-damages clause of the old Treasury Form 32—if the Government terminated for default in delivery, it had the right to purchase the goods elsewhere and surcharge the contractor for any additional costs incurred by reason thereof by the Government.

116. After the First War Powers Act, the Navy dropped almost entirely the liquidated-damages clause. At this time there were frequent delays due to changes in specifications, material and labor shortages and the like, and it was often if not usually difficult to hold the contractor responsible for delays in deliveries. In addition, contractors were extremely reluctant to take contracts containing such clauses. As the Navy was interested in getting the goods themselves, and not money damages, it determined to omit this clause generally.

vi. Guarantees

117. Most contracts in early 1942 contained a clause under which the contractor undertook to guarantee for a certain period the performance or durability of the articles covered by the contract in conformity with the specifications. This period varied from 3 months to a year or more. The contractor further undertook to correct or repair at his own expense any deficiencies or failures in the contract articles during such period. The ship contracts provided for trials, and adjustments and corrections by the contractor of the vessels during such

trials. If the contract was a fixed-price contract, the contractor would often include large contingencies in his prices to cover possible expenses during the guarantee period. Since 1943 and 1944 the period of the guarantee has been shortened, and [183] the clause has been entirely eliminated in a few cases from Navy contracts.

vii. Escalator clauses in fixed-price contracts

118. Most fixed-price contracts for any substantial amount in late 1941 and early 1942 contained provisions for adjustment in price upon changes in material or labor costs. I should estimate that a majority in dollar amount of fixed-price contracts executed during this period contained escalator clauses. These clauses varied substantially in scope and in the index selected to measure increases in costs.

119. Some of the more primitive types of clauses had attempted to protect the contractor to the full extent of any cost changes. Almost all of the clauses in use at the time the renegotiation statute was being debated, however, attempted to protect the contractor not against all variations in the cost of labor and materials, but only against such changes in those costs as might be attributed to general changes affecting the entire national economy and thus wholly beyond the contractor's control. The basis for calculating changes in costs under the escalator clauses were in most cases indices representing wage levels (either general or

for a specific industry) and material costs, usually indices published by the Bureau of Labor Statistics.

120. The most important determination in any escalator clause was the selection of the base to which the percentage of change in a selected index is applied in order to calculate the permitted adjustment of the contract price. The base selected varied widely among the several contracts, and was often extremely complicated to compute—requiring in some cases substantial cost accounting. All of the escalator clauses are rather complicated to apply. The computations [184] under most of them were made by the Cost Inspection Service of the Bureau of Supplies and Accounts. We have subsequently discovered certain errors in the drafting and application of certain clauses, whereby increases were computed on costs including the price increases against which the escalator clause was designed to protect the contractor. We corrected such increases as they were called to our attention.

121. All escalator clauses are to some degree inflationary and are harmful in that respect. The device had many disadvantages—it was used only because the Navy could not persuade contractors to take contracts on any other basis. Because of the uncertainties as to labor and other costs and the impetus to inflation which any war provides, contractors refused to run the risk of being tied to a fixed-price under a long-range contract. Escalator clauses were to be used only in long-term contracts. Our need for munitions was so great, however, that we could not quarrel very much over inclusion of

such provisions. It must not be assumed that because an escalator clause was included in a contract, the price fixed therein did not include any allowance for contingencies. As has been made quite evident later, the price did include substantial allowances for contingencies. Furthermore, as I have indicated, the escalator clause was not a complete answer to the contractor's insistence upon protection. The clause purported to protect him only against certain direct labor and material price increases and did not protect him against other labor and material costs or other indirect costs which were subject to real fluctuation. The device was an imperfect one which it was necessary for us to adopt in order to speed procurement. Even with the elimination of the risks covered by the escalator clauses, contractors were able in some instances to make profits aggregating 50% or [185] more of cost, as witness the ships contracts which I earlier cited.

122. On January 30, 1942, the Emergency Price Control Act was approved. The adjusted increases in contract prices under the escalator clause had to stop at any ceilings established by the Price Administrator on articles purchased or produced under the contract. At that time it was not known just how the Act would affect price escalation; subsequently specific escalator clauses have been worked out for contracts covering certain materials subject to OPA ceilings.

IV. NECESSITY OF THE RENEGOTIATION STATUTE

123. Had the renegotiation statute not been enacted, I am convinced that Navy procurement would have been affected in the following ways, among others:

- a. greater use of cost-plus contracts;
- b. enforced use of mandatory orders to obtain munitions with respect to which agreement on price could not be reached;
- c. reluctance on the part of contractors to take prime contracts, including preference for subcontracts; and
- d. excessive profits and waste.

These probable results are to a large degree all tied together. We should have found it more and more difficult, I believe, to allow the large contingencies demanded by contractors in fixed-prices, and should therefore have been driven to a much wider use of the cost-plus-a-fixed-fee contract and the mandatory order. I have earlier described the lack of incentive to reduce costs which is inherent in the form of the cost-plus-a-fixed-fee contract, and the large number of auditing personnel required to determine allowable costs under such contracts. Mandatory orders constitute a somewhat ponderous means of procurement, and leave the [186] Government with the pricing problem still on its hands, plus possible court proceedings. There can be little doubt but that profits would generally have been larger in the absence of renegotiation. After a

study of the complex problem of limiting profits in war to fair and reasonable amounts—the problem both as we faced it in the past and as we have faced it in this war—I know of no other type of profit limitation which can take into consideration the many diverse factors affecting the profits of different contractors and fairly adjust those profits, as adequately as does the renegotiation process. The growing Congressional and public criticism of exorbitant war profits in 1941 and 1942 would have resulted in an increasing reluctance on the part of manufacturers to take war contracts, and eventually in some form of profit limitation less palatable and less equitable than renegotiation. I am strongly of the opinion that, while the Government should consistently seek to improve its negotiating procedures in arriving at close prices, the problems of war procurement render impossible any completely satisfactory solution of the problem of initial pricing. Renegotiation, which affords a review of prices after the contractor has had the cost experience in the performance of his contracts, is to my mind an essential part of wartime procurement, today as well as in early 1942.

H. STRUVE HENSEL.

Sworn and subscribed before me this 28th day of December, 1944.

LUCILLE HOLLAND

Notary Public, D.C.

My Commission expires Sept. 1, 1946.

[Endorsed]: Filed Jan. 23, 1945. [187]

[Title of District Court and Cause.]

AFFIDAVIT OF R. E. SPAULDING IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [188]

State of California,

City of Los Angeles—ss.

R. E. Spaulding, being duly sworn, deposes and says:

I am the managing partner in Manlove & Spaulding Mfg. Co., plaintiff herein, and have read the affidavits of Robert P. Patterson, Under Secretary of War, and H. Struve Hensel, General Counsel for the Department of the Navy, and it is in the light of the unfounded assertions as applied to the operations of the plaintiff company contained in those affidavits, among other things, that this affidavit is presented.

No contracts made by this company for the effective dates of the renegotiation ending in the company's fiscal year December 31, 1942, were made with the United States or with any others than with private corporations or private parties, and that this company has enjoyed no privity of contract with the United States Government during and for the said fiscal year ending December 31, 1942; this is admitted by the United States on page 46 of its brief filed herein.

Every contract made by this company was made on a competitive basis for a fixed price and I assume, since we got the contract, that we were the lowest bidders. This company operates hand screw

machines and other precision machinery in the production of parts and for the renegotiation year 1942 produced 900,734 parts at a total sales value of \$405,594.74.

These 900,734 parts were manufactured at a cost of 45.02c each and required an average of approximately fifteen minutes each to produce. [190]

The gross profit before salaries, taxes, etc., amounted to \$211,816.85, but after \$99,733.34 for state and federal income tax, three working partners' salaries, \$75,000.00 and \$26,631.77 for purchase of machinery and facilities for production of these parts, is deducted from the gross profit, there is left a net profit of \$9863.56 or a profit of 1.09 cents on each part manufactured, or 2.4% on sales.

Prior to production of any war materials, this company was able to fix its prices of each article to be manufactured within a few mills of the cost of production and was not in the position of road builders who went into the shipbuilding business and were unable to estimate the cost of building a ship or of automobile builders who went into the business of building tanks and machine guns and had a variation of prices, in the case of tanks of \$67,401.00 for the first estimate and \$39,285.00 in the final price, and in the case of machine guns, \$868.07 the first estimated price, and \$300.59 as the final price.

The experience of the precision machine industry for fifty years has been that it can fix the price from drawings of each article to be manufactured within a few mills of the actual cost of production and

inasmuch as the final profit of this company on each item produced was about 1c each, there should be little controversy on its ability to fix the price without excess profit on the articles it was to produce.

The production of parts by this company has, of course, been on the much larger volume basis than its peacetime operations but the prices are correspondingly [191] much lower per item and it is only by reason of the volume of production that this company was able to make any profit on the basis of about 1c net gain on each part.

State and federal income taxes are, of course, not profits nor are the salaries of working partners and in the light of the statement of the Surplus Property Administration (to be found at page 80 in "Time" for November 20, 1944), is the purchase of facilities and machine tools to be regarded as profit. In that statement it was shown that since the beginning of World War II the Government alone has come into possession of machine tools representing over twenty-five years prewar production of the machine tool industry so that when the final end of this war arrives the tremendous surplus of machine tools will reduce the majority of them to mere scrap value and therefore their ownership cannot be regarded by any stretch of the imagination as profit.

The graphic illustrations and quotations contained in the affidavit of the Under Secretary of War of the inability of road builders and truck builders to estimate the cost of producing ships, tanks, and machine guns is not analogous to our

situation where we have for years been able to fix the cost of production within mills of the proper cost instead of within tens of thousands of dollars as in the case of the examples cited.

So far as this company is concerned, there has never been in fact any renegotiation since what really happened was that we were required to furnish a financial [192] statement of our sales and costs of manufacture after which the so-called renegotiators arbitrarily fixed an amount that we were called upon to pay after deduction of federal taxes and they informed the company that they were not interested in any counter offer or negotiation on our part.

Had this company followed the usual business practice of sound industrial economy and set up reserves for reconversion and the furnishing of jobs to returning veterans, its balance sheet would show a material loss.

To now pay the sums demanded by the Under Secretary of War and Price Adjustment Board would result in complete bankruptcy of this company and sale of all of its physical assets and irrespective of the payment of the sums demanded, the prospects are not bright for providing employment for returning veterans or anyone else.

Practically our entire assets consist of facilities, machinery and tools which, if sold today, would probably not bring 25c on the dollar and at the end of the war would have no more than a scrap metal value, in view of the fact that the productive capacity of machine tools is probably as much as

fifty times the normal peacetime needs of the country and after the war, machines that cost new \$12,000 to \$18,000 each will be nothing but a burden for storage costs and taxes, it will be cheaper to give them away than it will be to keep them and try to put them in operation.

The arbitrary stoppage of the money due plaintiff company from the defendant by the Under Secretary [193] of War has resulted in serious embarrassment in the operations of the company to continue efficient war operation in the face of such arbitrary discouragement.

70% of our 1942 production was identical with the production in 1940 and 1941. The individual orders or contracts for 1942 varied in amounts from 60 cents to \$8000.00 each.

There were no escalator clauses in any of our orders or contracts and all of our contractors held us to the price we bid.

Plaintiffs above named have been refused any information whatsoever as to the facts used as the basis for the unilateral order purporting to determine excess profits.

On April 11, 1944, the following letter was sent to the Secretary of War:

“April 11, 1944

Honorable Henry L. Stimson
Secretary of War
Washington, D.C.

Dear Sir:

On February 2, 1944, Mr. Robert P. Patterson, Under Secretary of War, acting under your au-

thority and pursuant to the Federal Renegotiation Act, made a declaration of excess profits of the Manlove & Spaulding Mfg. Co., a partnership, determining that said partnership for its fiscal year ending December 31, 1942, had made excess profits to the extent of \$110,000.00.

Said company and partnership hereby requests that you forthwith furnish to it a statement of such determination together with a statement of [194] the facts used as a basis therefor and of the reasons for such determination.

Said request is made pursuant to the provisions of section 701 of the Revenue Act of 1943.

Very truly yours,

MANLOVE & SPAULDING
MFG. CO.

By JOS. I. McMULLEN
LEO R. FRIEDMAN
Attorneys''

On April 17, 1944, plaintiffs received a reply to the foregoing letter as follows:

“War Department
Office of the Under Secretary
Washington, D.C.
Price Adjustment Board

Sprar

17 April 1944

Manlove & Spaulding Mfg. Co.
3524 Union Pacific Avenue
Los Angeles, California

Attention: Mr. Leo R. Friedman.

Re: Renegotiation of Manlove & Spaulding
Mfg. Co., a partnership for its fiscal year
ended 31 December 1942.

Gentlemen:

Your letter dated 11 April 1944, addressed to the Secretary of War, has been referred to the War Department Price Adjustment Board for reply.

Section 403(c)(1) of the Revenue Act of 1943 was not made retroactive by the Congress. Under the circumstances the renegotiation to which your letter refers is still under the previous law so far as the furnishing of a statement of facts is concerned. It has not heretofore been the policy of the War Department Price Adjustment Board to furnish such statements and as a matter of equity to the many hundreds of contractors who have entered into bilateral agreements the Board does not deem it proper to change this policy at this time.

For the Chairman:

W. JAMES MacINTOSH

Counsel."

R. E. SPAULDING.

Subscribed and sworn to before me this 26th day of March, 1945.

[Seal] MAX C. HODER,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires May 20, 1946.

[Endorsed]: Filed Mar. 26, 1945. [196]

CERTIFICATE

I, B. D. Gamble, Clerk of The Tax Court of the United States, do hereby certify that I have made a diligent search of the records of this Court with a view to determining whether or not any petition or any action of any kind whatsoever has been instituted in this Court by R. E. Spaulding, L. B. Manlove and P. M. Manlove, co-partners doing business under the firm name and style of Manlove & Spaulding Mfg Co., and I further certify that no petition or action of any kind has been filed of record in this Court by said R. E. Spaulding, L. B. Manlove and P. M. Manlove, co-partners doing business under

the firm name and style of Manlove & Spaulding Mfg. Co. to date.

B. D. GAMBLE,
Clerk, The Tax Court of the
United States.

Dated: Washington, D. C., May 11, 1945.

[Endorsed]: Filed May 28, 1945. [197]

[Title of District Court and Cause.]

STIPULATIONS

It Is Hereby Stipulated and Agreed by and between the parties to this action that the amount of the alleged indebtedness from the defendant corporation, Douglas Aircraft Company, Inc., to plaintiffs is the sum of \$27,580.80 as alleged in the answer of defendant, Douglas Aircraft Company, Inc., and not the sum of \$31,048.33 as alleged in Paragraph IV of the complaint.

Dated this 28 day of May, 1945.

JOS. I. McMULLEN,
LEO R. FRIEDMAN,
Attorneys for Plaintiffs. [198]
CHARLES H. CARR,
United States Attorney.
RONALD WALKER,
Assistant U. S. Attorney.
ROBERT E. WRIGHT,
Assistant U. S. Attorney.
Attorneys for Defendant.

[Endorsed]: Filed May 28, 1945. [199]

[Title of District Court and Cause.]

OPINION

This is an action under the Declaratory Judgment Statute, wherein plaintiffs seek to have this court hold that the Renegotiation Act (50 U.S.C.A., Appendix, Sec. 1191, in its original form to and including the amendments by the Act of July 14, 1943) is unconstitutional and unenforceable. The controversy arises over the fact that the War Department has determined that the plaintiffs' profits for the year 1942 were excessive, and in order to recapture said claimed excessive [200] profits has directed the defendant to withhold certain payments due the plaintiffs for the benefit of the United States in accordance with the provisions of said Renegotiation Act.

The United States intervened under the provisions of Sec. 401, Title 28 U.S.C.A. and has moved for a summary judgment on the grounds that the complaint fails to state a claim upon which relief can be granted. Plaintiffs admit that their cause of action is predicated solely upon the theory that said act is unconstitutional and if the court finds that said act is constitutional the motion should be granted.

A similar motion involving the constitutionality of said act was made in the case of *Lincoln Electric Co. v. Knox et al.*, 56 F. Supp. 308, before a three judge court, wherein the court denied the motion for summary judgment stating:

“The rule for summary judgment was, in our opinion, never intended to throw upon the court the burden of determining a case involving, on the one hand, a delicate question of law, and, on the other, complicated and controverted facts, without an adequate and proper hearing.”

The pleadings and affidavits submitted on the motion indicated to me that probably the factual situation could be fully developed on a pre-trial, consequently, I set the case for a pre-trial hearing at the same time the motion for summary judgment was set.

The facts as developed by the admissions of the pleadings and the admissions of the parties at the pre-trial hearing developed that the defendant, Douglas Aircraft Company, was a builder of airplanes for the government in the furtherance of the war effort; that the said defendant entered into numerous sub-contracts, in the form of work orders, with the plaintiffs for the manufacture, production and sale of mechanical fittings and parts, in accordance with specific plans and specifications furnished by the prime contractor to be used in the fabrication of airplanes built by it, in accordance therewith. The work orders usually were given and accepted by the plaintiffs on the strength of bids submitted to the prime contractor. The plaintiffs at all times knew that [201] the parts manufactured by them for the defendant were to be used in the

fabrication of airplanes for and at the expense of the government.

Following the adoption of the Renegotiation Act, through an exchange of letters, the plaintiffs agreed that all work orders received from the defendant would be subject to the provisions of said act, insofar as the same were required by law or by contract. Plaintiffs further agreed that the special conditions set forth in 42 and 42a would be applicable to all work orders received from defendant. The conditions contained in 42 and 42a amplified the procedure provided in said Renegotiation Act and provided further for the repayment of excess profits by sub-contractors in accordance with the provisions of said act. (See Exhibit A. and B. to answer admitted in evidence at said pre-trial.)

Thereafter, defendant continued to issue work orders to the plaintiffs and the plaintiffs continued to perform the same. Under the Renegotiation Act the War Department found that the plaintiffs' profits were excessive for the year 1942 and directed the defendant to withhold the amount of profits so found from amounts owing by defendant to plaintiffs under and by virtue of various subsequent work orders.

Upon the conclusion of the pre-trial hearing each party stipulated that the admissions made at said hearing would become a part of the record and that the motion for summary judgment and the final determination of the case should be submitted to the court for decision.

The plaintiffs contend that the said act is unconstitutional and therefore defendant is not justified in withholding payment pursuant to the directive of the War Department and have asked the court to so declare. It is admitted that the payments are withheld solely by reason of the withholding orders of the War Department in pursuance of the provisions of the said Renegotiation Act. The plaintiffs admit that if said act is constitutional they have no cause of action. All parties seek a ruling on the sole issue of constitutionality of said act and have directed their briefs to that end. [202]

On the other hand, the court is mindful that this issue should be avoided if the case can be determined on other grounds, notwithstanding the desires of the litigants. (*Arkansas Fuel Oil Co. v. Louisiana etc.*, 304 U.S. 197, 58 S.Ct. 832, 82 L.Ed. 1287; 16 C.J.S. p. 208; 6 R.C.L. p. 76 and 77; *Crowell v. Benson* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598).

The burden rests upon the plaintiffs to establish the unconstitutionality of the act in question beyond a reasonable doubt. (*Nicol v. Ames*, 173 U.S. 509, 514, 19 S.Ct. 522, 43 L.Ed. 786). While I do not believe they have overcome this heavy burden, I feel that this case can finally be determined on other grounds, namely:

First—The correspondence between the parties constituted a contract between them. To me these letters clearly establish an agreement on behalf of the plaintiffs to be bound by said Renegotiation Act, and thereby said agreement became a part of every

work order notwithstanding anything therein to the contrary. The parties having thus contracted, it becomes immaterial whether the act is constitutional or not. (*Jones et al. v. Great Southern Fireproof Hotel*, 86 F. 370, 6th Cir.; *Stover v. Winston Bros. Co.* 55 P. (2d) 821, (Wash.); *U. S. v. San Francisco*, 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050; *Interstate Consol. St. R. Co. v. Mass* 207 U.S. 79, 28 S. Ct. 26, 52 L. Ed. 111; *International & G. N. Ry. Co. v. Anderson County*, 246 U.S. 424, 38 S. Ct. 370, 62 L.Ed. 807).

The position of the plaintiffs is no different than if they had entered into a private contract with the defendant agreeing that all work orders would be filled and the charges therefore would include no excessive profits, leaving the determination of excessive profits solely and exclusively to arbitration by a third party. If such contract had been entered into, certainly the plaintiffs would not question its enforceability. In the case at bar the parties have agreed that the agencies of the government would have the authority to eliminate excessive profits in accordance with the provisions of the Renegotiation [203] Act. I see no difference between the two situations.

It would therefore appear that the parties, by their own contract, have eliminated the constitutional question.

Second—It is a recognized principle that a person may be estopped from asserting the unconstitutionality of an act. (*Pierce Oil Co. v. Phoenix*

Ref. Co., 259 U. S. 125, 128, 42 S. Ct. 440, 66 L. Ed. 855; *United Gas Co. v. R. R. Commission*, 278 U.S. 300, 49 S. Ct. 150, 73 L. Ed. 390; *Wall v. Parrott Silver & Copper Co.*, 244 U. S. 407, 37 S. Ct. 609, 61 L. Ed. 1229; *Com. of Internal Revenue v. Independent Life Ins. Co.*, 62 F. (2d) 1066, 1067; *Daniels v. Tearney*, 102 U.S. 415, 26 L. Ed. 187).

The correspondence heretofore referred to and the conduct of the Plaintiffs, in my opinion, creates an estoppel. The plaintiffs voluntarily executed their letter of November 14, 1942, at which time they indicated a willingness to be bound by the terms of the Renegotiation Act. They continued to accept work orders from the defendant. They knew and agreed that in performing such work in connection with the war effort any excessive profits were subject to recapture by and through the agencies of the government. After obtaining work orders and completing the same they are now attempting to avoid the effect of their agreement. It seems to me that by their own conduct they have waived their right to assert the unconstitutionality of the act in question and by the same token are estopped at this late date to retain any excessive profits. Having accepted the benefits of said work orders they are not now in a position to avoid the terms under which said work orders were issued and received.

Third—This action presents no justiciable controversy. Article I, §9, clause 7 of the Constitution provides as follows:

“No money shall be drawn from the Treasury, but in consequence of appropriations made by law. . .”

Congress in making appropriations has the power and authority not only to designate the purpose of the appropriation, but also the terms and conditions under which the executive department of the government may [204] expend such appropriations. Thus the War Department was required to make the Renegotiation Act a part of all its contracts.

The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same. Any attempt by the judicial branch of our government to interfere with the exclusive powers of Congress would be a plain invasion of the powers of said body conferred upon it by the Constitution of the United States.

Our judiciary has been exceedingly careful not to intrude upon the powers of the other two branches of the government and has often recognized its limitations in this respect.

In the case of *Decatur v. Paulding*, 39 U.S. 559 (14 Pet. 497), the court expressed itself as follows:

“* * * To permit an interference of the courts of justice with the accounts and affairs of the treasury, would soon sap its very foundations; money would not be drawn out according to its own rules, nor could the Secretary of the Treasury ever inform

Congress of the amount needed. Congress would, of necessity, be compelled to consult the court, not the Secretary, when making appropriations.”

In *Massachusetts v. Mellon*, 262 U. S. 447 at page 488, the following language is used:

“The functions of the government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.
* * *”

Pertinent language is used in *Standard Oil of California v. U. S.*, 107 F. (2d) 402, 409 (9th Cir.) wherein it was stated:

“* * * The disposal of the public lands is not a subject over which the ‘judicial power’ of the United States is extended. It is a field in which the authority of the Congress is supreme. *Lee v. Johnson*, [25] 116 U.S. 48, 6 S. Ct. 249, 29 L. Ed. 570; Art. IV, §3, Clause 2 of the Constitution, U.S.C.A. * * *”

Again in *Stitzel-Weller Distillery v. Wickard*, 118 F. (2d) 19 at page 22, the court said:

“In the *Haskins Bros.* case we said [66 App. D. C. 178, 85 F. (2d) 681]:

‘In the instant case it is therefore of no consequence whether the act under which the tax was collected be constitutional or unconstitutional. The fact that the tax has been collected and deposited in

the treasury by the collecting officials of the government renders the custodian of the fund impotent to withdraw the money and disburse it unless and until directed to do so by an act of Congress or until the United States shall submit to be sued to determine its disposition.

‘It is equally of no consequence that the bill alleges that the fund belongs to appellant and others similarly situated. It is not in the hands of the officers but in the treasury, and though earmarked as a special trust fund, has been mingled with the moneys of the United States. The purpose of the bill, therefore, is to coerce the United States, through their officers, to pay out money in the treasury as to which Congress has limited the power of withdrawal to the payment to the Philippine government. To permit this, would be to usurp the legislative function of appropriation, to substitute a court for the executive officers of the government, and to supplant by an order of court the duty and obligations imposed upon them by their oaths of office. It is therefore of no comment whether the United States have the use of this money as they do the ordinary revenues of the government or whether the money represents a trust fund created by Congress and earmarked for a specific purpose. In either case it is money in the Treasury of the United States as to which the United States had and have the power of control and disposition.’ ” (Underscoring supplied)

In *Gillies v. Webb et al*, 99 F. (2d) 585 (5th Cir.), the following may be found:

“On its face the constitutional point is without merit, for what is in question here is not the construction or validity of a statute, but of a contract voluntarily entered into with the Government. The fact that Congress authorized, indeed, required the inclusion in it of the clause in question as a condition to letting the work, is significant only upon the question of the authority of the executive officer to write the clause in. Without such authorization it may well be doubted that the contracting officer of the [206] Government would have had authority to insert it. Cf. *United States for Use and Benefit of Johnson v. Morley Construction Co.*, D.C. 17 F. Supp. 378, 388.”

Under the Public Contracts Act of June 30, 1936, Congress attached specific strings to certain appropriations analogous to those involved in the present action. Congress provided for the payment of minimum wages as determined by the Secretary of Labor to be paid by sellers of goods to the government. The constitutionality of this act was raised in the case of *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108. An injunction had been granted against the enforcement of the act and as a result the effectiveness of the same had been nullified for over a year. This provoked rather straightforward language from the Supreme Court, speaking through Mr. Justice Black, wherein certain lines of demarkation were drawn between the functions of the legislative and executive branches of the government and the judiciary. In plain and definite terms certain paths were forbidden for the

courts to travel. Among other things the court stated, starting at page 127:

“Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act. * * * Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties ‘require an interpretation of the law.’ Judicial restraint of those who administer the Government’s purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government.” (Underscoring supplied.)

* * * *

“* * * In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms [207] and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must

observe those of his principal. In both instances prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorization. For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority. Respondent's have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act. That respondents sought to vindicate such a public right or interest is made apparent both by their prayer that the determination be suspended as to the entire steel industry and by the extent of the injunction granted."

* * * *

"The case before us makes it fitting to remember that 'The interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.'" (Underscoring supplied.)

The plaintiffs being clearly within the purview of the Renegotiation Act and having agreed to be bound thereby are in no better position than the prime contractor. I am of the opinion that this case is dis-

tinguishable from *Coffman v. Breeze Corporations, Inc. et al.*, 323 U. S. 316, in that the case at bar deals with the expenditure of public funds. It would therefore appear that the plaintiffs' problems is one beyond the reach of this court.

Therefore, in view of the facts pleaded in the complaint and the surrounding facts brought out in the pre-trial of this case, the defendant is entitled to a judgment of dismissal. Defendant is directed to prepare forthwith findings in accordance with this opinion.

Dated: This 4 day of June, 1945.

BEN HARRISON,

Judge. [208]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing before the court without a jury on May 28, 1945, on the motion of defendant and intervenor for a summary judgment and on the counter motion of plaintiffs for a judgment in their favor, and the court having considered the pleadings, the motion filed by the defendant, and the intervenor, the United States of America, and the affidavits filed in support thereof, and having considered the motions and stipulations made and entered into at a pretrial hearing on said date and having considered the motion of plaintiffs aforesaid

and the affidavit filed in opposition to defendant's motion and all of the pleadings on file herein, and having taken the case under advisement, now finds the facts and states the conclusions of law as follows: [209]

I.

FINDINGS OF FACT

1. That at all times herein mentioned each of the plaintiffs was a citizen of the State of California, a citizen and inhabitant of the County of Los Angeles in the District aforesaid, and that the business of the plaintiffs was being operated and conducted in said county of Los Angeles; that defendant was a corporation organized and existing under and by virtue of the laws of the State of Delaware and doing business within the Central Division of this District; and that the matter in controversy in this suit exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

2. That at all times herein mentioned defendant was engaged as a prime contractor with the Government of the United States in manufacturing airplanes for the Government in furtherance of the war effort; that plaintiffs were engaged in the manufacture of airplane parts for the defendant and others devoting approximately 100 per cent of its capacity to the production of war materials and obtaining the materials used by them in said manufacture through priorities.

3. That the defendant during the year 1942 entered into numerous subcontracts in the form of

purchase orders with the plaintiffs for the manufacture, production and sale of mechanical fittings and parts in accordance with blueprints and specifications furnished by defendant, which purchase orders were given to and accepted by plaintiffs on the strength of bids submitted to defendant by plaintiffs as the result of competitive bidding in which plaintiffs and other firms and corporations participated; and that plaintiffs at all times knew that the parts manufactured by them for the defendant were to be used in the fabrication of airplanes for and at the expense of the Government.

4. That on or about November 14, 1942, plaintiffs addressed a letter to defendant (Exhibit B attached to defendant's answer) in the words and figures following, to-wit: [210]

“November 14, 1942

“Douglas Aircraft Company, Inc.

Materiel Division

P. O. Box 9337, Station S.

Los Angeles, California

Subject: Renegotiation Clause

Gentlemen:

We have received your letter of September 14, 1942, on the subject of renegotiation.

We hereby agree that Special Conditions 42 and 42A printed on the reverse side hereof shall be applicable to all purchase orders which you issue to us under Army and Navy contracts respectively; provided, however, that this agreement shall cover

only purchase orders in which you are required by law or by contract to insert such Special Conditions, and shall continue only so long as such requirement may be effective.

Yours sincerely,

MANLOVE & SPAULDING
MFG. CO.

(signed) By R. E. SPAULDING

Partner

That said Special Conditions 42 and 42A were and are in the words and figures following:

“Special Condition No. 42—Renegotiation under
Army Contracts

“(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to Seller under this contract can be determined with reasonable certainty, the Secretary and Seller will renegotiate the contract price to eliminate therefrom any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the date of completion or [211] termination of this contract as found by the Secretary.

“(2) Seller will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

“(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary, (a) be deducted by Buyer from payments otherwise due to Seller under this contract; or (b) be paid by Seller directly to the Government.

“(4) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount paid to the Government by Seller or deducted by Buyer from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts withheld by it from Seller hereunder.

“(5) As used in this Article:

(a) The term ‘Secretary’ means the Secretary of War or any duly authorized representative of the Secretary, including the contracting officer;

(b) The terms ‘renegotiate’ and ‘renegotiation’ have the same meaning as in Section 403(b) of the Sixth Supplemental National Defense Appropriation Act, 1942;

(c) The term ‘this contract’ means this contract as modified from time to time.

“(6) Seller agrees (a) to include in each fixed-price or [212] lump-sum subcontract hereunder for an amount in excess of \$100,000 the foregoing sections (1) to (5) inclusive, and (b) to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this section, and (c) to repay to the Government the amount of any

reduction in the contract price of any such subcontract which results from renegotiation thereof by the Secretary and which the Secretary directs the Seller to withhold from payments otherwise due under such subcontract and actually unpaid at the time the Seller receives such direction.

“The term ‘subcontract’ includes any purchase order from or any agreement with Seller (i) to perform all or any part of the work to be done under this contract, or to make or furnish all or any part of any articles or structures covered by this contract, (ii) to supply any services required directly for the production of any articles or structures covered by this contract, or any component part thereof, not including services for the general operation of Seller’s plant or business, (iii) to make or furnish any articles destined to become a component part of any article covered by this contract, or (iv) to make or furnish any articles acquired by Seller primarily for the performance of this contract, or this contract and any other contract with the United States. The term ‘articles’ includes any supplies, materials, machinery, equipment or other personal property.”

“Special Condition No. 42A. Renegotiation under
Navy Contracts

“(a) At any time, when in the judgment of the Secretary, the profits accruing to Seller under this Purchase Order can be determined with reasonable certainty, the Secretary and Seller, upon the written demand of the Secretary, will [213] renegotiate

the price with a view to eliminating such profits as are found as a result of such negotiation to be excessive.

“(b) In the event that such renegotiation results in a reduction of the price, the amount of such reduction shall, as may be directed by the Secretary, be deducted by Buyer from payments to Seller under this Purchase Order; or be paid by Seller directly to the Government; or be repaid by Seller to Buyer.

“(c) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount repaid to Buyer or paid to the Government by Seller or deducted by Buyer from payments to Seller pursuant to directions from the Secretary in accordance with the provisions hereof. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts repaid by or withheld from Seller hereunder.

“(d) The term ‘Secretary’ as used herein means the Secretary of the Navy and his duly authorized representatives.”

Thereafter defendant continued to issue such orders to plaintiffs and plaintiffs continued to perform the same.

5. That on February 2, 1944, Robert P. Patterson, Under Secretary of War, acting pursuant to the Renegotiation Act, as amended, duly made a unilateral order (in the words and figures set out in paragraph V(d) of the complaint) determining that \$110,000.00 of the profits realized by plaintiff

during its fiscal year ending December 31, 1942, under its subcontracts subject to renegotiation pursuant to said Act are excessive; and thereafter on May 1, 1944, said Robert P. Patterson, Under Secretary of War, duly directed defendant by an order in the words and figures set out in paragraph V(e) of the complaint to withhold for the account of the United States any and all amounts (not in excess of \$110,000.00 in the aggregate) otherwise due or which shall become due from defendant to [214] plaintiffs. That pursuant to said direction defendant withheld from plaintiffs for the account of the United States the sum of \$27,580.80 for the recovery of which amount this suit was instituted by plaintiffs. It is admitted that defendant's refusal to pay plaintiffs the amount so withheld is based solely on the withholding order issued by the Under Secretary of War and plaintiffs admit that if the Renegotiation Act is constitutional they have no cause of action. Defendant and intervenor admit that if the Renegotiation Act is unconstitutional, plaintiffs should recover and judgment should be for the plaintiffs.

6. That all of the business done by plaintiffs during the fiscal year ending December 31, 1942, was with private firms, corporations and individuals and none of such business was done on prime contracts with the United States of America. All the individual orders and contracts of plaintiffs for the year 1942 varied in amounts from 60 cents to \$8,000.00 each.

7. That plaintiffs have not filed a petition for redetermination of its excessive profits in the Tax Court of the United States and the time for filing that petition has expired.

8. That there is no genuine issue between the parties as to any material fact and defendant is entitled to judgment as a matter of law.

9. That on September 12, 1944, the Court certified to the Attorney General, pursuant to the Act of August 24, 1943, 28 U.S.C.A. 401, the fact that the constitutionality of the Renegotiation Act, an Act of Congress affecting the public interest, was drawn in question herein and thereafter and on December 18, 1944, an order was made allowing intervention by the United States and directing that the United States be made a party to the cause.

10. That the amounts sued for by plaintiffs in the complaint herein represented work done by plaintiffs for defendant from the 1st day of March, 1944, to and including the 31st day of July, 1944, and did not comprise any work done by plaintiffs for defendant during the fiscal year ending December 31, 1942, and the amount thereof was and is in the stipulated and agreed sum of \$27,580.80.

II.

CONCLUSIONS OF LAW

1. The agreement between the parties with reference to incorporation in purchase orders of Special Conditions 42 and 42A establishes an agreement on behalf of the plaintiffs to be bound by the Re-

negotiation Act and thereby said agreement became a part of every purchase order, notwithstanding anything therein to the contrary; the parties having thus contracted, it becomes immaterial whether the Act is constitutional or not. Therefore, the parties by their own contract have eliminated the constitutional question.

2. The agreement between the parties with reference to incorporation in purchase orders of Special Conditions 42 and 42A, the conduct of plaintiffs in continuing thereafter to accept purchase orders from the defendant and to perform the same creates an estoppel and thereby plaintiffs have waived their right to assert the unconstitutionality of the Renegotiation Act and are estopped at this late date to retain any excessive profits. Having accepted the benefits of said purchase orders, they are not now in a position to avoid the terms under which said purchase orders were issued and received.

3. This action presents no justiciable controversy for the reason that this Court has no power to interfere with the exercise by the Congress of its constitutional power to prescribe and define the terms and conditions under which the Executive Department of the Government may expend moneys appropriated by the Congress.

4. The complaint fails to state a claim upon which relief can be granted.

5. That defendant is entitled to judgment.

It Is Ordered that judgment shall be entered in conformity herewith.

Dated: July 30, 1945.

BEN HARRISON

Judge of the United States
District Court

[Endorsed]: Filed July 30, 1945. [216]

In the District Court of the United States In and
For the Southern District of California, Cen-
tral Division

No. 3806-BH Civil

R. E. SPAULDING, L. B. MANLOVE and P. M.
MANLOVE, co-partners doing business under
the firm name and style of MANLOVE &
SPAULDING MFG. CO.,

Plaintiffs,

v.

DOUGLAS AIRCRAFT COMPANY, Inc.,
a corporation,

Defendant.

JUDGMENT

This cause came on regularly for trial before the Court, without a jury, on May 28, 1945, and in conformity with the Court's Findings of Fact and Conclusions of Law, it is

Ordered and Adjudged that plaintiffs take nothing by their suit; and that defendant, Douglas Aircraft Company, Inc., do have and recover from the

plaintiffs its costs and charges in this behalf expended and have execution therefor.

Dated: July 30, 1945.

BEN HARRISON

Judge of the United States
District Court.

Judgment entered July 30, 1945. Docketed July 30, 1945. Book C.O. #34, Page 218.

EDMUND L. SMITH

Clerk

By [Illegible]

Deputy

[Endorsed]: Filed July 30, 1945. [217]

In the District Court of the United States For the
Southern District of California, Central Division

Civil No. 3806-BH

R. E. SPAULDING, L. B. MANLOVE and P. M.
MANLOVE, co-partners doing business under
the firm name and style of MANLOVE &
SPAULDING MFG. CO.,

Plaintiffs,

vs.

DOUGLAS AIRCRAFT COMPANY, Inc.,
a corporation,

Defendant.

UNITED STATES OF AMERICA,

Intervenor.

NOTICE OF APPEAL

Notice is hereby given that plaintiffs above named do herewith and hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment and order made and rendered and filed in the above entitled Court and cause on the 30th day of July, 1945, in favor of defendant and against plaintiffs and from the whole of said judgment and order.

Dated: August 1st, 1945.

JOS. I. McMULLEN

LEO R. FRIEDMAN

Attorneys for Plaintiffs [218]

Copy of the foregoing received this 1st day of August, 1945.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States

Attorney

[Endorsed]: Filed Aug. 1, 1945. [219]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL

Come now the plaintiffs above named and pursuant to the provisions of Subdivision d of Rule 75 of the Federal Rules of Civil Procedure for the District Courts of the United States, file this their designation of the points on which they intend to rely on their appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, and specify and designate said points as follows, to wit:

1. That the said District Court erred in granting the motion of defendants for a summary judgment.
2. That the said District Court erred in denying the motion of plaintiffs for judgment.
3. That the said District Court erred in rendering judgment for defendants.

4. That the District Court erred in holding that the complaint of plaintiffs failed to state a claim upon which relief could be granted.

5. That the District Court erred in failing and refusing to pass upon the constitutionality of the Federal Renegotiation Act.

6. That the District Court erred in holding that there was no genuine issue between the parties as to any material fact and that defendant is entitled to judgment as a matter of law.

7. That the District Court erred in holding that plaintiffs by their own contract had eliminated the constitutional question involved in the case.

8. That the District Court erred in holding that plaintiffs' actions created an estoppel which operated to prevent them from asserting the unconstitutionality of the Renegotiation Act.

9. That the District Court erred in holding that as a result of the letters and special conditions 42 and 42a, as set forth in "Exhibit B" attached to the answer of defendants, the plaintiffs agreed to the renegotiation of any or all of their contracts for the fiscal year 1942, or for the renegotiation of any contracts during said fiscal year.

10. That the District Court erred in not holding that as the result of the matters and things set forth in [221] "Exhibit B" attached to the answer of defendants plaintiffs only agreed to the renegotiation of contracts entered into between plaintiffs and defendant where any such contract amounted to the sum of \$100,000 or more.

11. That the District Court erred in not holding that the Federal Renegotiation Act was and is unconstitutional.

12. That the pleadings and papers on file and the stipulations entered into at the hearing of the cause established the right of plaintiffs to judgment and the right of plaintiffs to a declaratory judgment holding and declaring that the Federal Renegotiation Act is unconstitutional, all of which appears from the reporter's transcript of the proceedings at the hearing of the cause on file herein and the pleadings and affidavits on file herein following appeals.

Dated: August 1st, 1945.

JOS. I. McMULLEN

LEO R. FRIEDMAN

Attorneys for Plaintiff

Copy of the foregoing received this 1st day of August, 1945.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States
Attorney

[Endorsed]: Filed Aug. 1, 1945. [222]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Come now plaintiffs above named and file this their designation of the portions of the record, proceedings and evidence to be contained in the record on their appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The complaint.
2. Certificate of the District Judge, dated September 12, 1944. [223]
3. Answer of defendants.
4. Order allowing intervention by the United States.
5. Answer of the United States.
6. Motion for summary judgment.
7. Stipulation of May 28, 1945, as to the amount due from defendant to plaintiffs.
8. The reporter's transcript of the proceedings on the hearing and submission of the cause.
9. Affidavit of Robert P. Patterson.
10. Affidavit of H. Struve Hensel.
11. Affidavit of R. E. Spaulding.
12. Opinion of the United States District Judge.
13. Findings of fact and conclusions of law.
14. The judgment.
15. The notice of appeal.
16. Statement of points on which appellants intend to rely on appeal.
17. This designation of contents of record.

Dated: August 1st, 1945.

JOS. I. McMULLEN
LEO R. FRIEDMAN
Attorneys for Plaintiffs

Copy of the foregoing received this 1st day of August, 1945.

CHARLES H. CARR
United States Attorney.
ROBERT E. WRIGHT
Assistant United States
Attorney

[Endorsed]: Filed Aug. 1, 1945. [24]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL CON-
TENTS OF RECORD ON APPEAL

Come now the defendant and intervenor above named and designate additional portions of the record, proceedings and evidence to be included in the Record on Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Motion of the United States for Leave to Intervene; [225]
2. Notice of Motion of the United States for Leave to Intervene;
3. Certificate of B. D. Gamble, Clerk of the Tax Court of the United States.

Dated August 7, 1945.

FRANCIS M. SHEA,

Assistant Attorney General

CHARLES H. CARR,

United States Attorney

RONALD WALKER,

Assistant United States

Attorney

ROBERT E. WRIGHT,

Assistant United States

Attorney

Attorneys for Defendant and

Intervenor.

Copy received August 7, 1945.

JOS. I. McMULLEN

L. R. FRIEDMAN

Attorneys for Plaintiffs

[Endorsed]: Filed Aug. 7, 1945. [226]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 226 inclusive contain full, true and correct copies of Complaint for Declaratory Judgment and Money Judgment; Certificate; Answer; Notice of Motion for Leave to Intervene; Response to Certification and Motion by

United States to Intervene; Order Allowing Intervention by United States; Answer of the United States; Notice of Motion for Summary Judgment; Motion for Summary Judgment; Affidavit of Robert P. Patterson in Support of Motion for Summary Judgment; Affidavit of H. Struve Hensel in Support of Motion for Summary Judgment; Affidavit of R. E. Spaulding in Opposition to Defendant's Motion for Summary Judgment; Certificate of Clerk of the Tax Court of the United States; Stipulation; Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points on Appeal; Designation of Contents of Record on Appeal and Designation of Additional Contents of Record on Appeal which, together with copy of Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$54.90 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 31st day of August, 1945.

[Seal] EDMUND L. SMITH,

Clerk

By THEODORE HOCKE,
Chief Deputy Clerk

In the District Court of the United States in and
for the Southern District of California, Central
Division

Before the Honorable Ben Harrison.

No. 3806-BH—Civil

R. E. SPAULDING, L. B. MANLOVE and P. M.
MANLOVE, Co-partners, etc.,
Plaintiffs,

vs.

DOUGLAS AIRCRAFT COMPANY, INC., a
Corporation,
Defendant.

UNITED STATES OF AMERICA,
Intervenor.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
May 28, 1945

Appearances:

For the Plaintiffs: Joseph I. McMullen,
Esq., and Leo. R. Friendman, Esq., 935 Russ
Building, San Francisco, 4, California.

For the Defendant, Douglas Aircraft Company, Inc.: Charles H. Carr, Esq., United States Attorney, by Ronald Walker, Esq., and Robert E. Wright, Esq., Assistant United States Attorneys.

For the Intervenor United States of America: Walker Lowry, Esq., Attorney, Department of Justice, Washington, D. C. [1*]

The Clerk: 3806-BH Civil, R. E. Spaulding, and others, versus Douglas Aircraft Company and the United States of America, Intervenor.

Mr. Friedman: Ready for the plaintiffs.

The Clerk: Pre-trial hearing and motion of defendant for summary judgment.

Mr. Wright: Ready for the defendants, your Honor.

The Court: Gentlemen, I have put this down for a pre-trial hearing at the same time, due to a three-judge court decision by the District Court of the District of Columbia in a summary proceeding in a case of this character. The fact is they denied it. While maybe you can distinguish the case—the case I am referring to is Lincoln Electric Company v. Knox, 56 Fed. Supp. 308—I felt that there was probably no substantial difference between the parties as to the factual situation, and that probably through a pre-trial we could get a background, so that when the courts finally settle this they will not turn it off on a tangent and will be able to pass on the questions involved in this case. I might say that I tried a criminal case a year or so ago that involved one of these subcontracts, and in that case there was no dispute as to the procedure of the two concerns, the methods of business of the two con-

*Page numbering appearing at top of page of original certified Transcript.

cerns, and I thought perhaps the situation might be very similar in this case. [2]

Mr. Lowry: Your Honor, I think I could make a short preliminary statement about the facts in this case, if that will be helpful.

The Court: Let me ask some questions in the first place. I think I can bring out my points by asking some questions or making a statement as to the method that was followed in the other case, which also involved making parts for Douglas.

I assume that there is no dispute that Douglas has been engaged in the manufacture of airplanes for the government in pursuance of the war effort.

Mr. Friedman: No, there is no question about that.

The Court: And that the plaintiff in this case was making parts that were being used in the assembling of those planes.

Mr. Lowry: That is so.

Mr. Friedman: I think in the main that is true.

The Court: That is, I assume that they were also making them, perhaps, for other airplane manufacturers.

Mr. Friedman: That is true.

The Court: And you can answer this question. I don't know whether it is material or not. But probably the plaintiff was almost one hundred per cent devoted to war effort.

Mr. Friedman: I would say the greater part.

The Court: Approximately. And was the plaintiff engaged in this kind of work prior to its work

in war effort? [3] It was not what we call, in the slang expression, "a war baby"?

Mr. McMullen: No, it is not "a war baby."

Mr. Friedman: No.

The Court: But that it did, in fact, expand its facilities, I assume, to take care of its war efforts.

Mr. Friedman: I think that is correct.

The Court: And that the materials used in the parts were obtained through priorities.

Mr. Friedman: That is correct.

The Court: And any additional equipment that they needed to make the various parts, of course, had to be obtained by the obtaining of priorities.

I was going to ask as to the statement in here that the contracts or the work orders, as they are referred to, were based upon bids submitted by the plaintiff to the defendant.

Mr. McMullen: Yes, that is correct, sir.

Mr. Lowry: We understand, your Honor, that is true in the main; that, as far as all major releases of work were concerned, there were bids submitted. But occasionally after the original bid was submitted——

The Court: Well, that is a minor part.

Mr. Lowry: That is right.

The Court: When the bids were asked for and submitted, that Douglas would submit blue-prints—— [4]

Mr. Lowry: That is so, your Honor.

The Court: ——covering the parts that they wanted a bid on.

Mr. Lowry: In all instances.

Mr. Friedman: Yes.

The Court: And that the work was performed in accordance with those blueprints.

Mr. Lowry: That is so.

Mr. Friedman: That is right, and the bids based thereon.

The Court: Yes.

Mr. McMullen: And the order was awarded on the lowest bid. They were the lowest bidders; that is the reason they got the business. Those orders were put out to several manufacturers, you see, your Honor, and the bid is awarded to the lowest bidder.

The Court: Well, we would certainly assume they would be.

Mr. Lowry: Unless there was some other consideration, I assume, your Honor.

The Court: Yes.

Mr. Lowry: Douglas could, of course, award the bid to any one that they saw fit.

The Court: Yes. Then during the progress of the work it was being constantly inspected by government inspectors, was it not?

Mr. McMullen: No. [5]

Mr. Lowry: Not at the Manlove plant, your Honor. At the Manlove plant the inspection was by Douglas.

The Court: After the delivery of the parts——

Mr. Lowry: No.

The Court: ——or during the course of the making of the parts?

Mr. Lowry: Well, I am not sure, but I understand——

Mr. McMullen: As a rule at the Douglas plant after they were delivered.

The Court: They were accepted or rejected.

Mr. Lowry: Yes. And the army inspected the parts again when they were delivered to Douglas, and that inspection took place at the Douglas plant.

The Court: In the other case I had they had inspectors at the plant all the time.

Were the accounts and statements that were rendered to Douglas audited by agencies of the government at the plant?

Mr. Lowry: The army audits Douglas' books because Douglas is a cost-plus contractor.

The Court: I know, but did they audit——

Mr. McMullen: ——the plaintiff's books? No.

Mr. Friedman: No.

The Court: They never at any time made any examination prior to the renegotiation of the statements as to the correctness at the plant?

Mr. Friedman: No. [6]

Mr. McMullen: No. As I understand it, the government as an active factor never entered the plaintiff's plant, either for the purpose of auditing books or inspecting the bills. Is that correct, Mr. Lowry?

Mr. Lowry: I think that is so.

Mr. McMullen: In other words, the government did all of its auditing and supervision with its prime contractor.

The Court: Now may I ask was Douglas, the

prime contractor, working on a definite contract, or was it a cost-plus contract?

Mr. Lowry: Cost-plus.

The Court: Was there any knowledge on the part of the defendant to that effect?

Mr. Lowry: On the part of the plaintiff?

The Court: I mean on the part of the plaintiff.

Mr. McMullen: No.

Mr. Lowry: I assume so, yes.

Mr. McMullen: He had no knowledge except just hearsay, what you hear. But there is nothing appearing in the orders or correspondence to indicate it.

The Court: I know, but wasn't it a matter of general knowledge among all these subcontractors that the airplanes were built on a cost-plus basis?

Mr. Lowry: It must be so, your Honor.

Mr. Friedman: I wouldn't know about that.

Mr. McMullen: I wouldn't say so. I don't think so. [7]

Mr. Friedman: I don't know about that.

The Court: I don't know whether there are two answers or whether they are both joined in one answer, but there are two letters that are pleaded in the answer. Is there any dispute as to the correspondence?

Mr. McMullen: You mean the two letters set up in the affidavit of the plaintiffs?

The Court: No, in the answer.

Mr. Lowry: In Douglas' answer, Mr. Friedman.

The Court: It is the answer of the Douglas Company. There is a letter from Douglas, a form

letter, I assume, to the plaintiff; and the plaintiff responded. You have read the answer, haven't you?

Mr. McMullen: Yes, your Honor.

The Court: Here it is right here, gentlemen.

Mr. Lowry: I have a copy, your Honor.

Mr. Friedman: Yes, they were sent and signed.

The Court: It is stipulated, then, that those letters pleaded in the answer were actually sent, and the response made as indicated?

Mr. Friedman: That is correct.

The Court: And, of course, the fact that it was government work and plaintiff knew that the Federal Government was paying Douglas for the airplanes.

Mr. Friedman: There is no question about that.

The Court: Now, gentlemen, I have—— [8]

Mr. Friedman: May I interrupt your Honor while we are clearing up these factual situations? Your Honor probably has noted that there was a differential in the complaint and the answer as to the amount of money involved. We have agreed and signed a stipulation this morning that the exact amount involved is \$27,580.80. So that removes that item.

The Court: That fixes the amount.

Mr. Lowry: May this stipulation be considered by the court?

The Court: It may be filed.

Mr. Lowry: Your Honor, in that connection I have a certificate from the clerk of the Tax Court of the United States which says, in effect,

that he has examined the files of his court and finds that this plaintiff has not filed in that court any petition for redetermination of its excess profits. I think that is agreed between us, but I would like to have this certificate considered as part of the record.

Mr. Friedman: We have no objection to it. It is a fact.

The Court: Is there anything else? Of course, the answer admits everything but the unconstitutionality.

Mr. Friedman: Yes.

The Court: That is the only issue raised by the pleadings. Are there any other facts that either one of you gentlemen think should be clarified?

Mr. Friedman: There is only one thing more. As your [9] Honor will recall, in the affidavit filed by plaintiffs we set up two letters, one sent to the Secretary of War, and the reply, requesting information as to the facts and figures and data on which the unilateral determination of excessive profits was made. The answer stated that it was against the policy of the Department to disclose that information. There is no question as to those letters, Mr. Lowry?

Mr. Lowry: No. For the purposes of this motion it is conceded the letters were sent and the answer made.

The Court: The affidavits are not in conflict, as I view them. Each one is setting forth his own cause in the affidavits, and there have been no coun-

ter affidavits. There is no dispute as to that anyhow, so far as this motion is concerned, so that part is cleared up.

Now, gentlemen, I have pretty nearly worn out your briefs, and in hearing arguments in this case I do not care to hear a repetition of the things that I have been reading.

Mr. Friedman: While your Honor is referring to briefs, I have here a ten-page typewritten document, which comments, merely comments, on some of the cases referred to in the government's reply brief. I ask leave to file that. I have given Mr. Lowry a copy of it.

The Court: You are not going to give me something more to read, are you?

Mr. Friedman: It is not very long and you probably are conversant with the cases. There is probably nothing in this [10] closing brief your Honor doesn't know, anyway.

The Court: I don't know how you gentlemen desire to handle this argument. This court has more or less been in the habit of doing most of the arguing itself and not giving counsel much of an opportunity in that respect. I have a number of memoranda of my own and I would like to have some things clarified in my own mind.

Mr. Friedman: May I make this suggestion? I discussed with Mr. Lowry this morning the matter of the procedure in this case, and it was my impression that, as long as all the facts have been agreed upon—at that time, of course, we felt prob-

ably the only thing involved was the amount, because we have agreed on everything else—I personally can't see why this matter cannot be submitted to the court on its merits, rather than on the motion for summary judgment.

Mr. Lowry: Your Honor, we prefer to handle it on the motion for summary judgment. We would like to use this case not only as a precedent as far as the substantive features of this debate are concerned, but——

The Court: Well, I am afraid that unless you gentlemen can convince me to the contrary that I am not going to make either one of you happy.

Mr. Lowry: In any event we would like it to go along in the regular orderly procedure on the motion for summary judgment. That is the only thing that is before the court, as I understand it.

The Court: Well, you have raised the question and, of course, have raised it on the motion for summary judgment, but, after all, it is the responsibility of this court to make a final determination, if I can, and the thought I had in mind was that I would take the motion together with the information obtained here so that the record will be complete and any reviewing court will have a background, if they need it.

Mr. Lowry: That is satisfactory to us, your Honor.

The Court: In that way we will not have it go off on a tangent, that is, send it back, because, as was said in the Knox case, there should be a proper and adequate hearing.

Mr. Lowry: Your Honor, we think the way to handle this is to consider it on the motion for summary judgment and to consider that the materials which have been agreed to here this morning be a part of the record on the motion.

The Court: That has the same effect.

Mr. Lowry: I think so.

Mr. Friedman: Well, with this exception. My idea was that these facts having been agreed upon, there being no other factual issue before the court, the court could hear the motion for summary judgment and then we could submit the entire matter, the motion and the case on the merits. In that way we get a final determination rather than just an interlocutory ruling.

The Court: Regarding the question of constitutionality, [12] if the reviewing court passed on it they would pass on it, probably, strictly on the motion. Of course, this could have been raised on a motion to dismiss, as far as that is concerned, and there would have been strictly a constitutional question involved. But you gentlemen both appreciate and realize that it is a delicate matter for a trial court to pass upon the constitutionality of an Act of Congress. Sometimes I feel it is presumptuous unless we are convinced beyond a reasonable doubt that the Act is unconstitutional; it is a one-man court passing upon it, while the reviewing courts have the advantage of the consultation of minds; and, of course, the finality of reviewing courts is more effective and it is always, as I said

before, a delicate question for a district judge to take it upon himself to hold an Act unconstitutional if there is any way that he can avoid doing it.

Mr. Friedman: I understand that, your Honor. I realize it is a great responsibility and it is a delicate question and that, so far as the trial court is concerned, unless the constitutionality is clear it is probably better to adopt some procedure whereby that is left to a higher court. And that comes right back to what I am saying. As far as I know, a motion for summary judgment, unless granted, is not appealable. That is why I suggested that in this matter we come to some——

The Court: Why can't we agree to this? It seems to [13] me, counsel, the best way is to submit it so that either side will have a right to appeal when we get through.

Mr. Lowry: If that is going to be done, your Honor, I think the way it should be handled is for Mr. Friedman to make a cross-motion for judgment. I, at least, feel a little uncertain when things aren't done in the procedures that the court has established.

Mr. Friedman: Isn't this a proper procedure; if your Honor said, "All right, I will set this down for trial tomorrow——"

The Court: You can make it now if it is satisfactory to counsel.

Mr. Lowry: All right, make it.

The Court: An oral motion for judgment.

Mr. Friedman: Very well, your Honor. At this

time, then, on behalf of the plaintiffs, and in view of the fact that as a result of the pre-trial conference all of the factual issues have been settled and agreed upon, I move at this time that judgment be entered in favor of the plaintiff for the amount set forth in the stipulation as to the amount due, upon the ground that the Act is unconstitutional and, therefore, the orders which the defendant sets up as justification for not paying the amount admittedly due are without any force or effect, because the Renegotiation Act is unconstitutional and void because the unilateral order of determination runs counter to the Constitution and runs [14] counter to the Act and, therefore, the withholding order is without any vitality or effect.

Mr. Lowry: Your Honor, may it be agreed that our briefs and our affidavits are submitted in opposition to the motion that counsel has just made?

Mr. Friedman: I will add to my motion that all the papers, records, pleadings and stipulations now on file before the court be considered as part of the motion.

The Court: Satisfactory to counsel?

Mr. Lowry: That is satisfactory, your Honor.

The Court: That brings it right down to where a determination will place you both in a position where either one of you, if you so desire, can appeal.

Mr. Friedman: That was my idea in the matter. And may I add this, that the defendants and government raise no objection to the manner or form in which the motion is presented; that is, waive customary notice of presentation of such motions?

Mr. Lowry: We have no objection.

Mr. Friedman: And there is no objection to its being made orally, as suggested by the court?

Mr. Lowry: We have no objection to the form of the motion.

Your Honor, may I make one or two suggestions about your Honor's suggestion as to how this case or this argument might be handled? [15]

The Court: I will listen to suggestions, but that does not mean that I will follow them.

Mr. Lowry: Your Honor, it has been pointed out to me that as far as I am concerned I am here on behalf of the government and not on behalf of Douglas, and I suppose Mr. Wright ought to join in what I have said on behalf of Douglas.

Mr. Wright: I do that, your Honor. Just to keep the record straight.

Mr. Lowry: Now my suggestion as to the way of handling this, your Honor. First of all I would like to add one or two facts to what has already been stated, I am sure there is no dispute about them, and then, if it is satisfactory, your Honor, I would like to start over this case, and I would be glad and indeed anxious to have your Honor interrupt me at any point when it seems to you I have reached something that is debatable, and I will try not to repeat the things I have said in the briefs, at least not at any length, but I would like, if I may, to have an opportunity to present the all-around picture, so to speak, so that we can get these arguments in their proper context; and I suggest

that that would be as expeditious a manner of handling this as any other.

The Court: Gentlemen, there are certain features of this case that I want clarified, and I want to hear from both counsel on them. It is a well-recognized principle of law that the court should determine a case, if it can, without passing upon the constitutionality of an Act; the court [16] should avoid that. Consequently I have made some study of this picture to ascertain whether it could be disposed of without the necessity of passing upon the constitutionality. I do not know what more you gentlemen can say on the constitutionality of this Act than has already been presented in these briefs, except to hear yourselves expound. I believe that I have a fair grasp of the picture. But I would like to know from the plaintiff, in view of the letters attached to the answer, and which they have stipulated to, why they haven't entered into a contract which eliminates the question of constitutionality.

Mr. Friedman: I think there are several answers to that, your Honor. In the first place, if the Act is unconstitutional no stipulation can breathe vitality into that Act.

The Court: Counsel, have you any authority for that? The authorities that I have from the Supreme Court of the United States have clearly held that notwithstanding an Act is unconstitutional, that by contracting to comply with it that you are out.

Mr. Friedman: Well, that might be——

The Court: In other words, isn't the effect of these letters simply this? Douglas wrote and called your attention to the Renegotiation Act.

Mr. Friedman: Yes.

The Court: And they said that they wanted an agreement [17] from your company to the effect that they would comply with it.

Mr. Friedman: Yes.

The Court: And that is what you did. Now haven't you, by reason of that contract, placed yourself in a position where you cannot raise the question of constitutionality?

Mr. Friedman: No, for this reason; that those letters only apply to contracts made with the Douglas people and which are in excess of \$100,000.00, any contract that is in excess of \$100,000.00. We are suing the Douglas people for work done in 1944. The renegotiation period covered by the unilateral order was the fiscal year ending 1942. There is nothing to show that the renegotiation was based solely upon contracts made with the Douglas people or with any contracts made with the Douglas people.

The Court: I know, but you are claiming, of course, that because there is no relationship between you and the government that you are not subject to this Renegotiation Act.

Mr. Friedman: That is true.

The Court: But haven't you, by your agreement with Douglas, agreed to be bound by it?

Mr. Friedman: No.

The Court: What do your letters mean?

Mr. Friedman: Our letters mean just what they say. I am assuming now that we are bound by an unconstitutional [18] Act, according to your Honor's statement. The only thing that those letters did was for the Douglas people to agree that orders placed by Douglas with Manlove and Spaulding should be subject to renegotiation; that is all that letter says.

The Court: Well, what do you say?

"We hereby agree that special conditions 42 and 42-A printed on the reverse side hereof shall be applicable to all purchase orders which you issue to us under Army and Navy contracts, respectively, provided, however, that this agreement shall cover only purchase orders in which you are required by law or by contract to insert such special conditions and shall continue only so long as such requirement may be effective."

Then it sets forth the conditions, and follows out the Renegotiation Act as originally adopted.

Mr. Friedman: True, but it is limited to the orders placed by Douglas.

The Court: I know, but you agreed——

Mr. Friedman: In other words, we don't agree with Douglas that any business we have done with anybody else is subject to renegotiation; we have made no such agreement by these letters. We simply agreed with Douglas, according to their own letter, that the orders they have placed with them

should be subject to renegotiation, in the event that [19] any one of those orders exceeds \$100,000.00. Now that is all the letter says. Now along comes the government in 1944 and says, "We find that from all the business that you have done in the fiscal year of 1942 you have earned excessive profits." There is nothing to show that we earned any excessive profits only on contracts of Douglas, and there is nothing to show that we agreed to be bound by a renegotiation that involves business done with other firms. And even our letter of acquiescence says:

"We agree to special conditions 42 and 42-A" and so forth, "shall be applicable to all purchase orders which you issue to us under Army and Navy contracts, respectively, provided, however, that this agreement shall cover only purchase orders in which you are required by law or by contract to insert such special conditions and shall continue only so long as such requirement may be effective."

The Court: Then what do you say to this, for instance, on the exhibit attached?

"Seller agrees that buyer shall not be liable to seller for or on account of any amount due to the government by seller or deducted by buyer from payments otherwise due under this contract pursuant to directions from the Secretary in accordance with the provisions of this article."

Mr. Friedman: That is true, but that likewise is [20] limited by the——

The Court: But then haven't you estopped yourself from asserting the claim against the Douglas by reason of this?

Mr. Friedman: No.

The Court: They have relied upon your agreement here and you have accepted orders on the strength of it and continued to do business with them. Hasn't that, in effect, estopped you from asserting that any money that they are withholding on account of the orders of the Secretary——

Mr. Friedman: Let me go back and read to you the beginning of special condition No 42-A

“At any time when, in the judgment of the Secretary, the profits accruing to seller under this purchase order can be determined with reasonable certainty, the Secretary and Seller, upon the written demand of the Secretary, will renegotiate the price with a view to eliminating such profits as are found, as a result of such renegotiation, to be excessive.”

What profits? The profits under that particular order. There is no consent here to a renegotiation of their entire business for a year.

“In the event that such renegotiation results in a reduction of the price,——”

The price of what? The price under that order.

“——the amount of such reduction shall, as may be [21] directed by the Secretary, be deducted by the buyer from payments to seller under this purchase order.”

And then follows subdivision C, which relates to the very same thing. In other words, if any one of these particular contracts are renegotiated and the price is found to be excessive all that the plaintiff has agreed is as to that particular order we will abide by such renegotiation. But we haven't that situation here.

The Court: Let me ask you this. Is it true that all orders that they received after this Renegotiation Act had similar provisions? All your prime contractors.

Mr. Friedman: No, I don't believe that is true.

Mr. McMullen: Practically none of them have it, sir. Here is an example right here in 42. Here is where they set the orders, right here. It shows what general paragraphs apply. 42 and 42A are in none of them except the original. These are the orders involved in this suit. We have the complete set here. Your Honor might look at them.

The Court: Proceed.

Mr. Friedman: As I say, even adopting your Honor's view of it, we are only bound as to renegotiation for any particular order that is placed by Douglas with plaintiff. But we have not that situation here. We have here a unilateral order which says that considering everything in the year 1942 the Secretary determines that the profits that you [22] made are excessive in the amount of so much. That excess may have come from order from a firm entirely different than the Douglas people. These letters, and even the conditions annexed and set forth and which they agree to are not broad enough

to say that because you are giving us some orders which you, in turn, have to supply to the government, we agree that all our business shall be renegotiated. There is no such provision there.

The Court: Well, isn't the law itself a part of every contract or purchase order that was issued after that date?

Mr. Friedman: Only a valid law.

The Court: That is true.

Mr. Friedman: Only a valid law, and only to this extent. We concede, as we perforce have to concede, that Congress can by a general law say that all contracts made by the government, whether it expresses itself or not, shall have this provision, and it has been held that by that Act those things are incorporated in all contracts of the government. But we have not a government contract here. We are not contracting with the government in any way. We have simple contracts between private citizens, private individuals and, therefore, the provision that it shall be, by reference, incorporated without specification in any contracts of the government does not apply to us. And, as I said before, only a valid law. So on neither one of these theories are we estopped from seeking an ultimate judgment of this court [23] on the merits, on the ultimate question involved in this suit.

The Court: Under the statement that has been made here it is more or less definitely agreed that the Douglas people were paid by the Federal Government and Douglas, in turn, paid their subcontractors.

Mr. Friedman: True.

The Court: What have you to say to the proposition that it is beyond the functions of the court to interfere with Congress in the disbursement of its funds?

Mr. Friedman: I have to say: that while the court cannot interfere with the disbursement of funds of Congress, the court can determine whether or not—let me put it this way. While the court cannot pass upon the wisdom that prompted Congress to disburse its funds, the court can pass upon whether Congress had the power to disburse its funds, because that is the very purpose of the courts.

The Court: Well, do you base your answer on that premise?

Mr. Friedman: No, I am only answering the question as your Honor propounded it. But if I construe your Honor's question correctly, it is this. We are not involved here with the disbursement of government funds by Congress. That would only arise in a controversy between Douglas and the government. We are not paid by the government. It is true that Douglas is paid by the government, but we are not paid [24] by the government. We are paid by Douglas. I have cited, as your Honor recalls, in the brief a case which I think answers your Honor rather clearly, where the government had employed a prime contractor in which they agreed to pay for the expenditures for labor of that contractor, plus 15 per cent. The laborer sued the gov-

ernment in the Court of Claims, on the ground that——

The Court: Yes. You need not repeat that.

Mr. Friedman: Your Honor is familiar with that.

The Court: I am familiar with it. But the point that I am making is this: that the Supreme Court of the United States has held that it is the sole function of Congress to expend the funds of the government, through the Executive, and that when there is an attempt to interfere with the disbursement of funds under an appropriation—and this, of course, is a part of the Appropriation Act because it is a guide for the Appropriation Act; in fact I think it was a part of the Appropriation Act, was it not?—that then that is a matter that is solely with the Executive and does not become a function of the courts.

I assume you are familiar with the case of *Perkins v. Lukens Steel Co.*, 310 U.S. at 113, where they had the Public Contracts Act up, and in that situation the Secretary of Labor was to fix the minimum of wages to be paid on public works, and the Court of Appeals of the District of Columbia enjoined the steel companies, and Mr. Justice Black, in a very [25] scorching opinion of the court, held that the courts had no jurisdiction. I will see if I can find the parts that I have in mind. And I am interested to find out how we can circumvent this case. I will read a number of parts. I will read the first part. It gives a little bit of the picture.

“In exercise of its authority to determine conditions under which purchases of government supplies shall be made, Congress passed the Public Contracts Act of June 30, 1936. By virtue of that Act, sellers must agree to pay employees engaged in producing goods so purchased ‘not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which . . . the supplies . . . are to be manufactured or furnished under such contract.’ The Court of Appeals for the District of Columbia has held that the Secretary erroneously construed the term ‘locality’ to include a larger geographical area than the Act contemplates, and has ordered six Members of the Cabinet including the Secretary of Labor, the Director of Procurement and all other officials responsible for purchases necessary in the operation of the Federal Government, not to abide by or give [26] effect to the wage determination made by the Secretary for the iron and steel industry either as to the complaining companies or any others.”

Then it goes on and tells of the steps whereby the reviewing court passed upon that and enjoined for more than a year the enforcement of that Act, and we find this language:

“Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and condi-

tions upon which it will make needed purchases acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guideposts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act."

Further on it says:

"Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties 'require an interpretation of the law.' Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and [27] happily apportioned by the genius of our polity to the administration of another branch of Government."

"We find nothing in the Act indicating any intention to abandon a principle acted upon since the Nation's founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases. The Committee Hearings and Reports and the construction of the measure by its sponsors disclose no purpose to invoke judicial supervision over agents chosen by Congress to perform these duties. And sections 4 and 5 do not subject a wage determination to such review. Provision for hearings and findings by the Secretary with respect to decisions upon breaches of stipulations by contractors, once purchases have been

made, is indicative of a lack of intention to create any rights for prospective bidders before a purchase is concluded."

"In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a [28] purchasing agent of a private corporation must observe those of his principal. In both instances prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorization. For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority. Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act. That respondents sought to vindicate such a public right or interest is made apparent both by their prayer that the determination be suspended as to the entire steel industry and by the extent of the injunction granted."

"The case before us makes it fitting to remember that 'The interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied

that such a power was never intended to be given to them'." [29]

"Our decision that the complaining companies lack standing to sue does not rest upon a mere formality. We rest it upon reasons deeply rooted in the constitutional divisions of authority in our system of Government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public. The judgment of the Court of Appeals is reversed, and that of the District Court dismissing the bill is affirmed."

Now, they are as much as saying in there that it presents no justiciable controversy when it comes to the expenditure of public funds.

Mr. Friedman: No. Well, I don't want to dispute your Honor, but isn't this what the case holds, in substance; that where a principal empowers an agent to make contracts and, merely for the guidance of the agent, sets forth certain things which it says the agent shall be guided by, that if the agent disregards those instructions and enters into a contract with a third person, the third person, who has voluntarily entered into such a contract, cannot complain that the agent has stepped beyond the bounds of his instructions as that is a matter that is solely between the agent and his principal?

The Court: No, that isn't what it holds, in my mind.

Mr. Friedman: That is just what Justice Black says. [30] But, furthermore, conceding that when

it comes time for Congress, directly by legislation or through agents, to make contracts and enter into the expenditure of public funds, if it is a subject-matter that Congress had a right to act upon, the courts will not interfere with the wisdom or with the manner of that expenditure.

The Court: Well, the Congress, under the Constitution, has the sole power——

Mr. Friedman: ——to expend money.

The Court: ——to expend money. That also gives it the right to state under what conditions it will be expended.

Mr. Friedman: That is true.

The Court: And that is the power of Congress and not the function of the courts to interfere with.

Mr. Friedman: That is true, I will concede that, in the event that Congress acts, first, in a constitutional manner and, secondly, pursuant to a power it has under the Constitution. The power of Congress to make the appropriations, the expenditures of public money is limited to constitutional purposes.

The Court: I know, but——

Mr. Friedman: All right.

The Court: Just a minute on that statement.

Mr. Friedman: Let us concede that.

The Court: Just a moment on that statement. What is a constitutional purpose for expending money? The grant [31] given to Congress under the Constitution is pretty broad.

Mr. Friedman: It has the right to spend money

in pursuance of any of the 18 powers conferred on it.

The Court: I know, but in your brief you recognize that the purpose of this Act is salutary.

Mr. Friedman: I simply concede, for purposes of argument, that it is salutary.

The Court: Well, let us go a little step further so that there will be no misunderstanding. This court takes the position, and there is nothing that you can say to the contrary that will change my view on that, that it is not only salutary that Congress control the so-called war millionaires that developed out of the last war, but absolutely essential, and the very system that you are fighting for, the profit system, you are threatening—I am not saying you——

Mr. Friedman: I know what you mean.

The Court: ——but I say take this particular case. But claiming that Congress cannot control these excessive profits is to say simply the death knell of your profit system, because when this war is over and all this new crop of millionaires springs up, if they do spring up as a result of the profits of the war, when these boys get home look out for your profit system. The facts as set forth in the affidavits of these large concerns that have returned voluntarily their excessive profits indicate that they must be [32] fair if they are going to protect the very system upon which they exist.

Mr. Friedman: I agree with that.

The Court: So let us not argue that point.

Mr. Friedman: No, I am not arguing that, your Honor.

The Court: I just want that to be clear.

Mr. Friedman: I think your Honor overlooks one fact, and probably we are getting a little beyond the confines of this case. While we talk about these excessive profits the court must not overlook the fact that many of these profits, the greater percentage of all these so-called excessive profits have been recaptured by the government by way of income taxes.

The Court: I know, but that is taken into consideration in your renegotiation.

Mr. Friedman: No, no. Oh, no, your Honor. The Act provides that they have nothing to do with the tax problem except when they determine that there is excessive profits then there shall be certain bookkeeping entries made in the Treasury Department to show that instead of income tax that comes to the government as a recapture. In determining whether the contract is excessive or not they do not take into consideration what has to be paid for income taxes.

The Court: I know, but in renegotiation, the final settlement, the two are adjusted.

Mr. Friedman: Well, that is really a bookkeeping entry. [33]

The Court: It is simply, you might say, a method to circumvent any excessive profits; if they don't get it by taxes they get it by recapture.

Mr. Friedman: But in all of these cases, as-

suming that everybody has paid their taxes—they should—the government has already got about 70 per cent of the money that is excessive before they ever get around to redetermination. But let me come back to this matter that your Honor is discussing. Granting now that the government has the right to expend its money, granting that it has the right to put whatever terms and conditions it wants into its contracts, granting that it has the right to see that those terms and conditions are strictly conformed to by the other contracting party, we have not that situation here because we have not contracted with the government.

The Court: Now let us find out about that. Not a direct contract, but I think we can assume, at least for the sake of argument, that this Act applied to Douglas.

Mr. Friedman: Yes, I don't think there is any question of it, if it is valid.

The Court: And it was part of their contract, so they were subject to renegotiation. You took a contract to furnish certain parts or plans and specifications, and in light of these letters weren't you bound to their portion of the contract by reason of these letters?

Mr. Friedman: No. [34]

The Court: They were not in direct privity, but aren't you in a position of anybody that acts as a subcontractor, that he has to perform certain portions of the prime contract? And these letters are part of it?

Mr. Friedman: Well, let me divide that into

two parts. First, if there were no letters it is very clear that we, as subcontractors, could not have proceeded against the United States for any part of our subcontract. It is likewise clear that the United States could not have proceeded against the subcontractors; its sole remedy was to look to its prime contractor, and if the prime contractor came along and said, "I am sorry but I subcontracted so-and-so," the government would have a perfect right to say, "We are not concerned with what your dealings with subcontractors were, our dealings were with you and you have agreed to do this and this and this." Now, have these letters altered that situation in any way? Before the government could claim any rights under these letters it would have to show that the contract price of Douglas was excessive, or it would have to show that certain portions of the work done by plaintiffs for Douglas was based upon an excessive price, if there is any such thing.

The Court: Well, I know that some people do not believe there is such a thing as excessive profits, but I happen to be one of those that does believe it.

Mr. Friedman: There is in our common understanding, but [35] just what each person thinks is excessive may differ. But is this not the point? Let me put it this way. Can the government come in and say, "Now, Mr. Douglas, we had a contract with you in which you agreed to turn out so many airplanes at so much money. You had a subcontract. Now, that subcontractor, although it has not made any excessive profits off of the subcontract

with you, has, in dealings with a half dozen other firms, made a million dollars too much profit. Therefore, under our contracts with you, and the agreement of this subcontractor that if its profits with you are excessive," which is not the case here, "but because it has had that contract with you we are now going to say that this man, this firm, this subcontractor is subject to an invalid law, and we are going to renegotiate everything he has done, and you are going to hold the money out and pay it to us." Now, that is just the situation we have here. This is not a case where the government has come along and said, "Pursuant to these letters we find that the contracts that you had with Douglas have produced an excessive profit." They do not say any such thing. What they say is, "We find that due to all the work you have done in 1942 you made an excessive profit." So we find our subcontractors in a far different position than prime contractors. Prime contractors, no matter if they dealt with the army today and the navy tomorrow and the marines the next day and some other department of the government the next day, the government could come in [36] and say, "Here, we can renegotiate all your business even though in dealing with this particular branch of the armed forces you never made a penny profit, but in dealing with this branch over here you made a great deal, because, as a prime contractor, this law, if it is valid, gives us the right to renegotiate everything you have done, or if it is invalid, because, by your

agreement with us, you have agreed to be renegotiated on all your work with the government.”

But when you step down one notch to the subcontractor and find that the subcontractor has only by agreement provided that he will be bound by the renegotiation, solely and exclusively as to certain and particular orders, then it is only those orders that they can base a valid redetermination upon it, in fact, the Act is invalid. Now, that is our position here and that is what we are contending for; that these letters do not give the government a blanket power to renegotiate under an invalid statute, and if they have any effect at all they limit the government—just as the government must limit other people, the government is, in turn, limited—they limit the government to the right and power only to renegotiate those contracts that the plaintiff has with Douglas, and nothing else.

Now, the answers show we weren't only doing business with Douglas, we were doing business with many firms in 1942, never once directly with the government. Now, that being so, there is no showing that these contracts were the ones [37] that were renegotiated, or that there was a penny of profit made, let alone excessive profit, under the Douglas contracts. Then when the government says, “We can't pay you any money,” we have a right to come in and say, “Why, you have got to pay us the money unless we are bound by the Renegotiation Act, and if the Renegotiation Act is invalid you have no defense to the paying of this

money because you owe it to us." So I think that puts us right back where we started.

The Court: I am ready to listen to any argument either side wishes to present, except that I do not wish to have the same ground covered that is covered by these affidavits.

Mr. Friedman: There is one more ground I want to call your Honor's attention to, and I would like to call your Honor's attention to that because it has been raised in the reply brief of counsel. Counsel raises this point, or, rather, the government raises this point; that we have no standing before this court because we have not exhausted certain administrative remedies. I don't know whether your Honor has given any thought to that at all, I mean beyond what is said in the brief. However, the argument of the government in that regard, I think, has been settled by the Supreme Court last January in the case of *Coffman v. Breeze Corporations*.

The Court: You cite that in your memorandum?

Mr. Friedman: I give it in my closing memorandum. In that case plaintiff brought a proceeding in equity to enjoin [38] the defendants from paying certain royalty payments to the government. It had to do with the Patent Royalty Payment Act, in which Congress enacted a law that if any patents were involved in the war effort, or whatever it was, and the royalty agreements were too high, that Congress or some designated official could determine what the proper amount of royal-

ties, that is, non-excessive royalties, should be paid, and had the power to issue withholding orders to the licensees under the patents not to pay the royalties. The court held that there was no justiciable issue before the court because, it being a proceeding for an injunction, the plaintiff had an adequate remedy at law in that he could sue the licensees for the royalties, and that in that suit, it being set up that the payment was refused to be made because of the withholding order made under the Royalty Adjustment Act, that in that suit the constitutionality of the Act would be the paramount issue and the court would have to determine it under that Act. Now, that comes pretty close, your Honor, to what we have here and to what we have already discussed. The government has the right to control its expenditure of funds. It passed a bill providing that if the government was using these patented articles and devices, that when it came down to paying for it, it could readjust the royalties that some third person was to get, just like a subcontractor is to be paid, and the court held in that case that in a suit brought for the recovery of the [39] royalties, even though the government had stepped in and made a determination, that the owner of the patent couldn't receive all the royalties that he had set forth in his license agreements; nevertheless that in that suit the validity of the Royalty Adjustment Act would be the direct point in issue, and the court said—it is only a very few words:

“Compliance with the duty under the Act to pay into the Treasury the royalties withheld from appellant would operate, by the terms of the Act, as a discharge of the obligation to pay appellant.”

That is under the withholding order.

“If that defense were offered the constitutional validity of these provisions of the Act would be a justiciable issue in the case, since upon its adjudication would depend appellant’s right of recovery.”

And that is just exactly what we have here, whether you call it the Royalty Adjustment Act, whereby the government has the right to readjust royalties contained in private contracts, or whether you call it renegotiation, whereby they have the right to adjust payments to be made in private contracts. There is no difference. In each instance the government makes a determination and in each instance the government issues a withholding order, and in each instance the Supreme Court says when the suit is brought by the person who claims it is entitled to the money under the contracts, [40] the court must pass on the constitutionality of the Act. That was decided last January by the Supreme Court.

That is the only other point outside of those in the brief.

The Court: Let me ask this. This Act has been constantly amended where experience has indicated it needed strengthening. Under the original

Act there was no provision for a review by the Tax Court, was there?

Mr. Friedman: No, no provision until the Revenue Act of 1943 was adopted in February of 1944.

The Court: Not until 1944?

Mr. Friedman: That is right.

The Court: Would not this picture have to be viewed through the law as it existed in 1942?

Mr. Friedman: That is true, and so I have set up in our brief, and I have emphasized that fact, with this exception; it would have to be viewed, I take it, as the law existed at the time the unilateral order was made, which was subsequent to 1942, because the amendments from 1942 to 1944 didn't change the basic structure of the business at all. It added to it by providing that certain other departments of the government were involved, and so forth. You see, all the Act says, and I am not going to reargue that point, all the original Act said was if anybody has made excessive profits the government has a right to determine those and recapture them. Now, summed up, that is what [41] the original Act said, and that portion of it was never changed until the Revenue Act of 1943 was adopted in February, I think it was, February of 1944, and, by the very terms of that Act, it is not made applicable to any fiscal year that ended before January 30, 1943; so that, this being a fiscal year of 1942, as your Honor says, the whole matter has to be determined under the terms of the original Act.

The Court: There is one part of this picture that hasn't been quite clear to me, and that is that provision, "be recaptured within a year."

Mr. Friedman: I haven't really given much thought to that. Whether that means that the proceedings for its recapture have to be commenced within the year, which the Revenue Act of 1943 now says, that the proceedings must be commenced, renegotiation proceedings, within the year, or whether it means that the actual ultimate determination under the old Act had to be made within a year I don't know.

The Court: It seemed to indicate to me that a man is to know within a year's time where he stood.

Mr. Friedman: It seems to me that that would be the logical construction to place upon it; because to say that a man can go ahead and conduct his business and, assuming that he has made excessive profits, pay his income tax and dispose of it in some other manner, and along comes the government a couple of years afterwards, in this case two years afterwards and says to this man, "Two years ago [42] you made a lot of money you have got to give back."

The man says, "I haven't got it any more."

"Well, that is just too bad. We will just take everything you have got. That's all."

Frankly, I haven't mentioned it in my brief, but I haven't passed upon it and I am not in a position to give more than my own personal opinion. I mean I have no authorities to support that phase

of it. I didn't think it would be brought up. But there is another point.

The Court: Wouldn't that be a question that this court would more or less have to pass upon? If the renegotiation was too late then there is no controversy?

Mr. Friedman: Yes, that is true. If the renegotiation was too late then the Secretaries were without jurisdiction to make the order, and if they were without jurisdiction to make the order—and I use it in the broad sense, not as applied to the court—they were without the power and authority to make the order. In other words, if this operates as a statute of limitations upon their activity, then the order is void on its face.

The Court: Is there any more you wish to say?

Mr. Friedman: That is all I wanted to call your Honor's attention to, except to this very ambiguous part of the Act of 1942. We have in our briefs and I have done it a great deal in discussing this matter with the court, referred to renegotiation, but, as I read the Act of 1942, renegotiation in the Act of 1942 contemplates a voluntary agreement between the Secretary and the contractor. I see nothing in the Act of 1942 that allows a unilateral, ex parte, determination. It says: "When, in the opinion of the Secretary, a contractor has received excessive profits, he shall renegotiate the contract as follows," and then it provides for conferences and agreements at which the figure is mutually agreed upon. I see nothing in the Act——

The Court: Well, then, an obstreperous contractor could destroy the effectiveness of the Act.

Mr. Friedman: I realize that is a weakness, because I realize that no person by refusing to take part in a matter can say that nobody else has a right to do it and I merely mention that as an indefinite part of the Act. I do not think it is a valid objection, I will be perfectly frank about that, but it certainly leaves the Act in a very nebulous condition, other than the fact that no man, having been served with process, merely by staying away from court can prevent somebody from getting a judgment. There may be such a thing as a default under these proceedings, too. The new Act corrects it. The Revenue Act of 1943 expressly provides, even if they appear or don't appear, if they don't agree, that the Board of its delegated authority can make a unilateral determination.

Your Honor has referred to the fact of the Tax Court. Of course, I assume your Honor is not confusing the word "court" with "court" in its ordinary sense.

The Court: No.

Mr. Friedman: The Tax Court is only an administrative agency. It is not a judicial body.

The Court: I understand that.

Mr. Friedman: I just wanted to be sure. Sometimes the mere use of the word "court" leads us to believe it is a judicial tribunal.

I have nothing further except what is in the brief, your Honor.

The Court: We will take a five-minute recess at this time, gentlemen.

(Short recess.)

Mr. Lowry: Your Honor, I would like to make one or two suggestions in connection with the points raised by your Honor in this morning's discussion. First of all, with respect to these letters that are included in the answer of Douglas, Mr. Friedman has suggested——

The Court: Will you speak a little louder, please?

Mr. Lowry: Mr. Friedman has suggested that those letters are not applicable here because they relate only to Douglas' business, and he has implied, as I understand him, that that renegotiation did not reach the Douglas' business. The order of the Undersecretary which appears in the complaint determining excessive profits concludes by saying that \$110,000.00 profits realized by the contractor during its fiscal year ended December 31, 1942, under its contracts and subcontracts subject to renegotiation pursuant to the provisions of the Act are excessive. Now, it seems to me that that order plainly points out that the order reached all of the contracts which were subject to the statute and, accordingly, the order reached these contracts with Douglas, the contracts between Manlove and Douglas, the purchase order agreements and, accordingly, it seems to me that Mr. Friedman is in a position where he is attacking an order that is founded at least in part on a renegotiation proceeding to which he has already agreed.

Your Honor mentioned this morning also the case of Perkins versus Lukens Steel.

The Court: Before you leave the other point I would like to know if that is all you have to say on the question of whether the parties are bound by their contracts, and, secondly, whether or not, by reason of those letters, which I feel form a contract, they are not estopped from now asserting the unconstitutionality of the Act because they were not only doing business with them at the time but continued to do business with them after the execution of those letters. I would like to get your viewpoint on these two angles.

Mr. Lowry: We have suggested in the brief, your Honor, that this plaintiff is not in a position to contest the constitutionality of this statute because he continued to do [46] business after the Renegotiation Act was placed on the books, and we think that what the Lukens case stands for is the proposition that because the government states the terms upon which it will do business, then your remedy if you do not like those terms is not to go into court and complain about it, your remedy is to do business with someone besides the government; and we have always felt that at least as to business transacted after April 28, 1942, when this statute went on the books, you can make a very strong argument that anyone that continued to do business which, under the terms of the statute, was subject to the Act, has, by doing that business, consented to the application of the statute, consented to renegotiation in accordance with the terms of the Act; and, as your Honor

indicated, I think the Lukens case stands for that proposition and supports that argument. Our difficulty, your Honor, with the Lukens case, and why we have not considered that it is a complete answer to renegotiation problems arises with the business, with the contracts entered into before April 28, 1942. As your Honor knows, the statute applies not only to contracts entered into after the date of the Act, but it applies to contracts which were entered into prior to the date of the Act, but as to which on the date of the statute final payment had not been made. Now, we have had some difficulty in getting to the conclusion that as to that part of the business you cannot fairly say to the contractor—— [47]

The Court: Well, doesn't that represent a difficulty in this whole picture because of a split? At one time, business up until April 28, 1942, there was no provision for renegotiation, and then after that it was subject to renegotiation.

Mr. Lowry: That is right, your Honor.

The Court: One of the problems that has concerned me is the apparent retroactive effect of this Renegotiation Act.

Mr. Lowry: That is certainly a point for consideration. The facts which necessitated that the statute be made retroactive, if we may use that term, are explained in the affidavit of the Undersecretary of War. Your Honor will recall that although this Act was entered into only four months after we got into the war, by that time so rapid had been the rate of contracting between the government——

The Court: I realize the reason, but it is strictly

a legal proposition for the court to consider. Now, here is a man doing business and at least is supposed to know the conditions under which he is doing business and we find that there is a law that affects business prior to April 28th; also that they renegotiate any profits that he made on business before that date, practically four months, one-third of the year.

Mr. Lowry: That is so, your Honor, and we feel, as I say, that there is difficulty in applying the rule of the *Lukens Steel* case to that business. We do not believe that [48] there is any substantial doubt about the constitutionality of what the Congress did, because it is certainly said, by a host of cases, that Congress may regulate existing contracts and may regulate the profits from existing contracts; that is, two people, by getting into contractual relationships with each other, cannot release their business from the power of Congress to regulate it; and we have cited the power of Congress to regulate it; and we have cited in our reply brief any number of decisions to that effect, including the *Norman* case and the *Blaisdell* case and a great many others. So that, while we feel it may be as to that business your Honor may wish to consider the constitutionality of the statute on the merits we do not believe there is any doubt about the constitutionality as so applied.

The Court: Now, both parties present this case on the sole question of the constitutionality of the Act. In other words, is the Act constitutional or is it unconstitutional? Now, when we look at the Act

in that manner we are not concerned with the first four months, we are concerned with the statute. Now, the position of counsel for the plaintiffs is that if the Act is held constitutional they have no cause of action; and you would admit that if it is unconstitutional that you have no defense.

Mr. Lowry: We have thought that was so, your Honor, because this statute does——

The Court: Well, that is the position you are taking. In other words, you are trying to put this thing right up to [49] the court for final determination to find out where you stand.

Mr. Lowry: That is so.

The Court: Now, I might ask counsel for plaintiff: Do you contend the Act in its present form is unconstitutional also?

Mr. Friedman: You mean as it now exists?

The Court: Yes.

Mr. Friedman: Yes, your Honor.

The Court: In other words, you claim the whole picture presents an unconstitutional method—not a method—but on account of the indefiniteness of the term “excessive,” that makes the Act unconstitutional?

Mr. Friedman: In other words, we assume, for the purpose of all these proceedings, that Congress does have the power to provide for renegotiation, but we contend that it has not exercised that power in the manner prescribed by the Constitution. Boiled down, that is our position.

Mr. Lowry: Well, your Honor——

The Court: Pardon me for the interruption.

Mr. Lowry: Surely. What I was trying to say is that we think that the Lukens case probably forecloses all argument about the constitutionality of the Renegotiation Act in so far as the renegotiation applies to business done after the statute came on the books. We think that is simply an expression of the familiar rule that the statutes [50] in effect at a given time become part of each contract executed by private parties.

The Court: But am I concerned about that first four months? Their cause of action or two causes of action—are there not two causes of action?

Mr. Lowry: I think so.

The Court: One cause of action is for declaratory relief and they ask for a declaratory judgment that this Act is unconstitutional, that is what they are asking for, and that, by reason of it being unconstitutional, the Douglas people owe them this amount that you have stipulated to this morning. Now, to use the slang expression, you have put it up, just cold turkey, to the court whether that Act at that time, when it was adopted by Congress, was constitutional. Now, whether it was retroactive or not, that is another question, isn't it? That is not in issue in his case.

Mr. Lowry: Well, possibly not. I think it may be because of the provisions of the order of the Undersecretary, which apparently on the face of the order reached not only the business done after April 28, 1942, but also the business done before that.

The Court: I know, but when it comes down to

the final analysis, aren't we concerned only incidentally with the orders of the Secretary? We are concerned with the statute here that is claimed to be unconstitutional.

Mr. Lowry: I see your point. You are suggesting that if this case is directed to obtaining a declaratory judgment that the Act as it came upon the books, regardless of its application, is unconstitutional——

The Court: Counsel in his brief said the sole question is the constitutionality of the Act.

Mr. Lowry: Well, if that is so, and I think possibly it is, then I would assume that you could at least make a very strong argument that you don't reach it because of the Lukens case, the case which says the government can state the terms upon which it will do business, and I assume that same rule would apply to business done indirectly through a private contractor. But I think your Honor will want to give consideration to the terms of this order in this connection. That is the only suggestion I have.

Mr. Friedman suggested that the tax returns in effect did the renegotiation job. That, of course, is not true. The figures your Honor will be interested in knowing in the hearings that were held not long ago in the House Ways and Means Committee——

The Court: Counsel, for some reason or other I can hardly hear you.

Mr. Lowry: I am very sorry. I say your Honor will be interested in knowing that in the hearings that were held not long ago before the House

posed to extend the statute again it was [52] pointed out that the total refunds under this statute now amount to about six billion dollars, and had the government relied solely on the Revenue Laws between one and a half and two billion dollars of that amount of money would not have been returned to the government; so it is perfectly plain on the figures, your Honor, that taxation is not an adequate substitute for renegotiation, as Mr. Friedman apparently suggested.

Mr. Friedman was referring to the government's position about exhaustion of administrative remedies. I think he has misunderstood what we argue. We do not contend that your Honor because of the rule of exhaustion of administrative remedies cannot consider the constitutionality of the Act. We do contend that the failure of the plaintiff to go to the Tax Court forecloses any consideration of the terms of the Undersecretary's order. If Mr. Friedman's plant was not satisfied with what the Undersecretary did, then his remedy was in the Tax Court, and our argument in the brief with respect to exhaustion of the administrative remedies only goes so far as to the amount and the terms of the order, your Honor, but it does not include any contention of the constitutionality of the statute.

Now, your Honor also suggested that it would be appropriate to consider this case on the basis of the law as it existed in 1942. I assume you are referring to the date of the order, February 2, 1944, which was issued pursuant to [53] the 1942 Act.

I think, your Honor, that the question for consideration here is not the state of the law at any particular time but the rights which the Congress by this statute gave to the plaintiff, and we think it doesn't make a bit of difference whether, in determining whether or not plaintiffs' constitutional rights have been violated, Congress passes one bill today and another bill tomorrow or passes both bills on the same day. The fact of the matter is that plaintiff did have a right under the Revenue Act of 1943, the amendments which became effective February 25, 1944, plaintiff did have a right expressly to go to the Tax Court, and we think that before this court or any court reaches the conclusion that renegotiation in some way denies due process, consideration must be given to the fact that Tax Court review was provided. It doesn't seem to us to make any difference whether Congress provided that review on April 28, 1942, or provided it on February 25, 1944, so long as the right was provided to the plaintiff.

The Court: Do I understand by your argument that Congress in 1944 could have passed this Act and made it retroactive as to the contracts of 1942?

Mr. Lowry: I am not suggesting that, your Honor. What I am suggesting is that when Congress, on February 25, 1944, specifically provided that people in the position of this plaintiff could go to the Tax Court, then it is appropriate for your Honor to consider the fact in determining whether [54] or not there has been any denial of due process of law to this plaintiff. If I may say it again,

it doesn't seem to me that if you are considering a man's constitutional rights, and whether or not Congress has denied them, it doesn't seem to me it makes any difference if Congress confers his rights upon him in two statutes instead of in one.

The Court: I know, but the Act of 1944 might have been constitutional and the Act of 1942 unconstitutional.

Mr. Lowry: That is conceivable, your Honor.

The Court: And the Act of 1944 would not make the Act of 1942 constitutional if it was unconstitutional, would it?

Mr. Lowry: Well, the question for decision here——

The Court: In other words, there might have been lack of due process under the original Act, but in 1944 due process was provided; in other words, to correct that defect that might have been ascertained in the original Act. Now, isn't that true?

Mr. Lowry: That is possible, your Honor, but what I am suggesting is that the question for decision in this court, as in any court in this country, is not an academic question as to whether or not some statute violates the Constitution. The question for decision always is: Has plaintiff been deprived of any of his rights under the law? And accordingly, in order to reach or in order to come to a conclusion on that question it is necessary to look at all [55] of his rights, not merely the rights provided in one statute but the totality of the rights that have been accorded to him. That is, it is in-

conceivable to me that a court could reach the conclusion that plaintiff's rights have been denied because he has no right to a hearing when the Congress specifically gave that man a right to a hearing, and I can't understand that it makes any difference whether Congress gives him that right in the first statute or the second statute. That is, I do not understand that the Constitution says to Congress, "Gentlemen of Congress, you have to do all your business on one day." I don't understand that.

The Court: They wouldn't do any business if that were true.

Mr. Lowry: That is right.

The Court: But that is not answering my question. At least, it doesn't seem to me it is answering the question. The question here would be whether the Act of 1942 provided for due process, would it not? For instance, there might be and have been, undoubtedly, cases where Acts have been held unconstitutional because of lack of due process.

Mr. Lowry: That is so, your Honor.

The Court: All right. Then can Congress come along and make an amendment that would be retroactive and make the original Act constitutional?

Mr. Lowry: Your Honor,— [56]

The Court: Isn't that what you are arguing?

Mr. Lowry: The difference between us is in the statement of the question. You state that the question for decision is whether or not the Act of 1942 was constitutional. I say that the question for de-

cision is the same as the question for decision in any court. The question is whether or not Congress has deprived this man of his constitutional rights. It is not an academic question about constitutionality of a statute. It is a question of what has happened to this plaintiff before this court at this time. There are a host of decisions——

The Court: I finally grasp your approach. Let me ask this. Doesn't the Act provide it shall be within one year?

Mr. Lowry: Your Honor, may I make one more suggestion about that other point? Even if we were wrong about what I have just suggested, nevertheless it is clear that there would be court review under the 1942 Act. The 1942 Act does not preclude court review, and there are decisions in the Supreme Court, including the case of *Stark v. Wickard*, which is cited in our briefs, which say that when the statute is silent the general jurisdiction of the equity courts of the United States applies and relief can be had if there has been arbitrary action. Furthermore, it was well understood under the original Act that there would be an opportunity for people to go to court, and that was necessarily so because your Honor will appreciate that what the Undersecretary [57] does is simply to make a determination of an amount—in this case \$110,000.00—but by signing the paper that doesn't get the United States' money. The United States has to get its money by one of the three methods provided in the statute.

The Court: I understand that.

Mr. Lowry: And each of those methods, your Honor,—pardon me.

The Court: That reminds me of another inquiry that I have. I was wondering why the plaintiff in this action could not have brought a straight action against Douglas for that amount of money, and that would have brought all the issues out.

Mr. Lowry: I think so, your Honor. I think that this complaint does both things——

The Court: Of course, the complaint is framed specifically to obtain a ruling on the constitutionality.

Mr. Lowry: That is so, and for a money judgment. It is for both things.

The Court: It is for a money judgment, but there will first have to be a decision of unconstitutionality as the initial step.

Mr. Lowry: I would assume so; otherwise the plaintiff is not entitled to relief. What I was about to say is that if the United States takes any one of those three methods for collecting its money the United States inevitably sets [58] up a law suit somewhere. That is, if the United States withholds the money which would otherwise be payable to the contractor, the contractor can come to the Court of Claims and sue the government on a direct contract. If the United States goes out and gets the money by bringing a suit in the District Court of the United States, as it may do under the statute, that, of course, sets up a judicial forum. And if the United States uses the other method of getting the money, the method employed here, why, then you

have the questions presented as they are presented here today. So that it seems to us very plain that there was adequate opportunity to go into the courts and adequate opportunity to get all the due process in the world under the 1942 Act, even if your Honor should construe that the 1943 Act is not applicable.

Now about this question of the statute of limitations, I assume that the provision which your Honor has in mind is Section 403 (c) (4), the very last sentence of Section 403 (c) (4), which reads:

“No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.” [59]

I read that to be simply a statute of limitations. I read that to mean, as it says, that you can't begin a renegotiation unless you do it within one year of the close of the fiscal year of the contractor within which the contract is terminated.

The Court: Are you reading from the original Act of 1942?

Mr. Lowry: Yes, your Honor.

The Court: What is it?

Mr. Lowry: It is 403 (c) (4).

The Court: (c) (4)? I don't find any (c).

Mr. Lowry: That must have come in in the amendment of October. It is on page 12.

The Court: Of your brief?

Mr. Lowry: Of the appendix to the brief.

The Court: Yes.

Mr. Lowry: You see, it is the first full paragraph.

The Court: There is nothing here to indicate when they commenced it.

Mr. Lowry: No, your Honor. That problem is not raised by these pleadings, and I assume that the reason is that it was commenced in time.

Mr. Friedman made some suggestion about the fact that there is nothing in the statute to indicate that renegotiation can take place unless it is done voluntarily. I think your Honor correctly pointed out that that could not have [60] been the intent of the Congress. The purpose of this Act was to avoid a situation in which you penalize the people that are co-operative, people that are not too anxious to get rich out of the war. The purpose of the Act was to make the voluntary procedure of renegotiation, which had been worked out by the community and the Services, applicable in all cases, whether people liked it or not, and I think it is generally understood that is the effect of the statute, and in that connection I might point out to your Honor that the language of the Act is that the Secretary is directed to eliminate excessive profits, and we think that makes it plain that the Congress intended that the statute should be mandatory.

Now, unless your Honor has some other problem in mind, I would like only to do this much about the constitutionality. I would simply like to refer to—

The Court: I might call counsel's attention to the fact that I asked for an advancement of this case until 9:30 this morning so that I could get away early, so if you are going to start out on a broad scope, why, I wouldn't want to break in.

Mr. Lowry: Unless your Honor has some reason or is anxious to hear some argument on the constitutionality I, at least, will be satisfied simply to refer to two statutes which are not in our brief and to which I think your Honor would like a reference. We have suggested in our brief that [61] this question of determining whether or not something is excessive is, in all substantial features, the same question that a public utility commission has in determining whether or not a rate is reasonable.

The Court: Of course, you, in your brief, have set up a number of examples where Congress has delegated to an agency certain authority or certain directions. And, of course, the plaintiff has been relying upon those mainstay cases of the Lever Act.

Mr. Lowry: Well, we have tried to suggest, your Honor, that the Lever Act cases are not applicable here because they don't involve the question for decision here; that is, the question of propriety of a delegation of power to administrative officials. So far as I know it has always been recognized that the Cohen Grocery case and companion cases are not guiding authorities in deciding the question that is presented here.

What I was about to say, your Honor, is that in connection with our contention that the job here is

no more difficult, that the standards are no more lucid than the standards which every public utilities commission applies, I would like to give your Honor a citation to the Transportation Act, as it is now known.

The Court: In addition to what you have already cited?

Mr. Lowry: Yes, your Honor. It is 49 U.S.C.A., Section 15. If your Honor will read that section you will see [62] that the Interstate Commerce Commission has the job of determining what is reasonable and what is fair, and there is no definition in the statute of "reasonable" and "fair." The words themselves are an adequate guide to action, the courts always hold.

The Court: We might ask this question, and it presents an additional reason why the court should avoid this constitutional question. What about the recent decision of Justice Douglas in the Squires case, wherein he states, in effect, that the decisions of the Supreme Court are to be considered with the Act to determine whether or not it is constitutional? Now, if that language is as broad as it imports on the face of it, the Supreme Court can clarify this by its own decisions.

Mr. Lowry: I am not sure that Mr. Justice Douglas is doing anything more than recognizing expressly what the court always does.

The Court: What the Supreme Court always does.

Mr. Lowry: That is right, what the Supreme Court always does.

The other statute, your Honor, is the Public Util-

ities Act of California. That is Act 6386, in Section 32.

The Court: What is it?

Mr. Lowry: It is the Public Utilities Act of California.

The Court: And your citation?

Mr. Lowry: It is Act 6386 in Deering's, I believe, [63] Section 32. If your Honor will note, there again you have typical language of "reasonable and unjust," and so on, without any further definition.

Mr. Friedman: May I say a word or two in reply? I will not be long.

The Court: I must leave in five minutes.

Mr. Friedman: I will only take four.

The Court: All right.

Mr. Friedman: First, your Honor, as to these tax cases and the tax statutes, we have cited and relied rather heavily upon the case of *Ryan v. Panama Refining Company*, which is quoted in our briefs. The court there discusses the tax statutes, or these rate statutes, I should say; and, as we pointed out in another place, the court is explicitly stating that under any of these statutes which give to commissions the power to fix rates, there is reserved to the Supreme Court the power of determining whether they have properly and correctly fixed a rate. We have no such situation here. Counsel has referred to our right to go to the Tax Court. All we could do in the Tax Court is to get a readjustment of the figure. We can't go to the Tax Court with the question of the validity of the or-

der. We cannot go to the Tax Court for the question of the constitutionality of the Act, because the Tax Court couldn't pass on it; it is merely an administrative agency and it must assume, under the law, that it must function according [64] to the Act.

Secondly, and lastly, if the Act is itself unconstitutional the provision that you can go to the Tax Court likewise falls with it, because what is the use of giving you an appeal to a court——

The Court: Counsel hasn't contended that you have the standing in this court—of course, he contends that as to the amount that was fixed, that by not proceeding you are bound by that amount, but he is not raising the question that you are not in court because you haven't exhausted your administrative remedy.

Mr. Friedman: I want to make it clear to the court; we are not contesting the amount in this case. We are contesting the whole order.

The Court: I understand that.

Mr. Friedman: Yes.

The Court: So that the court is not involved in so far as the order itself is concerned. It is only involved with the one problem. They are not claiming that you are not entitled to your day in court on the constitutionality of the Act. The only thing is that I am strongly of the opinion that it doesn't present a justiciable controversy for this court.

Mr. Friedman: I am not going into the balance of it. I am just coming back to this one point that Mr. Lowry made in his opening argument, I mean

in his remarks, and which I [65] think answers this thought that is in your Honor's mind. Assuming now that the representations I have made to the court find support in the record and that the order determining excessive profits was predicated upon all of the business done by plaintiffs, and leaving out the question of the division of that particular fiscal year under the statute, does not the argument presented merely come down to this: Because included in this order were some contracts that were subject to renegotiation by agreement or otherwise, that the order must be upheld? Is not the converse of that really the rule; that if that order is based upon the renegotiation of contracts that the government could not renegotiate, the fact that part of it is valid—a part that we can't divide here and determine the amount of—that fact renders the whole order void so far as this proceeding is concerned? In other words, you cannot say that because a fraction is good that, like a drop of bad oil that will spoil a quart of good oil, that that good part will purify the balance of the order? It can't be done. This order must stand or fall upon the ground that the Secretary constitutionally had the power to make it in its entirety. If it didn't, the order is no good.

The Court: Counsel, just a minute. I am very much interested in hearing anything and everything that counsel has to say, but I have a definite appointment. I opened court a half hour earlier this morning in order that I could [66] keep the appointment. I will be glad to, and not only glad but invite you to come back at 2:00 o'clock to pre-

sent anything additional that you may have to present, but I am now already late.

Mr. Friedman: I think we have fully discussed it. I just wanted to say this. That was the last point I wanted to call to your Honor's attention.

The Court: I don't want counsel to feel that you are shut off.

Mr. Friedman: No, I don't at all.

The Court: Because this is an important question. But I started in a half hour earlier so that I could leave.

Mr. Friedman: I understand that. You have been very patient and attentive with us.

The Court: The court has been very much interested in the whole subject matter and appreciates the able manner that counsel on both sides have presented the case. The only difference between counsel, it seems to me, is that we have about three sides to this case, two parties and the court. The court is trying and is still going to try to decide this case without passing upon the constitutionality; I feel that it is my duty, and I have spent considerable time on that angle of the case. While you gentlemen have tried to force me right into the corner, I have been trying to find a way to get out of that corner. I want to tell you frankly if I can decide this case to my own satisfaction [67] without passing on the constitutionality, I am going to do it.

Mr. Friedman: I think if your Honor will read *Coffman v. Breeze* you will find we have got you right smack in the corner.

The Court: I have had people think they had me in the corner before, but I wasn't in the corner when they got there.

Mr. Friedman: Well, I have seen that myself before.

The Court: And, after all, you know the court realizes that anything that I say on the question of constitutionality means little; that the real responsibility rests upon the reviewing court, and I am satisfied with the able counsel that are in this case that there is little that I could say on that question that would either help or hurt either one of you in presenting it to the reviewing court. So even if you think you have me in a corner and I get out of the corner, whether it is on sound grounds or not, you still have your full opportunity of presenting it on other grounds, on the ground that you are trying to have this case determined upon.

I am not fearful of the issue. I am simply mindful of the many admonitions that the books are full of relative to the duties of a trial court; in fact, the duty of the reviewing court also. But I am simply trying, in that respect, to perform my duty in accordance with the instructions [68] as given by the reviewing courts. It would be an easy matter for me simply to say "Motion granted" or "denied," and go on my way.

Mr. Friedman: Surely.

The Court: I realize that. And there would be no occasion for me to write any opinion on the subject matter, because it would soon be supplanted

by another opinion that might either affirm or reverse me, and then that would be only another step.

Mr. Friedman: Yes, there is always an easy way, your Honor, but it is not always the proper or best one.

The Court: So I have virtually convinced myself that I can get out of your corner.

Mr. Friedman: Well, I hope not.

The Court: Thank you, gentlemen.

Mr. Friedman: I want to thank you, Judge, for telling us what is in your mind. It is so unsatisfactory to argue to a court when you don't know what the court wants to hear, and it is so easy when the court tells you what it is interested in.

The Court: I am glad you think it was easy.

Mr. Lowry: Thank you, your Honor.

[Endorsed]: Filed Sept. 4, 1945. [69]

[Endorsed]: No. 11134. United States Circuit Court of Appeals for the Ninth Circuit. R. E. Spaulding, L. B. Manlove and P. M. Manlove, co-partners doing business under the firm name and style of Manlove & Spaulding Mfg. Co., Appellants vs. Douglas Aircraft Company, Inc., a corporation, and United States of America, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed September 4, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 11134

R. E. SPAULDING, L. B. MANLOVE and P. M.
MANLOVE, co-partners, etc.,

Appellants,

vs.

DOUGLAS AIRCRAFT COMPANY, INC.,
a corporation,

Appellee.

APPELLANTS' DESIGNATION OF PARTS
OF RECORD TO BE PRINTED AND
STATEMENT OF POINTS INTENDED TO
BE RELIED ON.

Appellants above named hereby designate for printing in the above matter the entire transcript, as certified by the Clerk of the United States District Court, including therein the reporter's transcript of the proceedings had before the United States District Court.

Appellants hereby adopt as their points on appeal "The Statement of Points on Which Appellants Intend To Rely On Appeal" as filed in said

District Court and as included in said typewritten transcript beginning with page 220 thereof.

Dated: September 6, 1945.

LEO R. FRIEDMAN

JOS. I. McMULLEN

Attorneys for Appellants

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Sept. 11, 1945. Paul P. O'Brien, Clerk.

No. 11,134

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. E. SPAULDING, L. B. MANLOVE and P. M.
MANLOVE, co-partners doing business
under the firm name and style of Man-
love & Spaulding Mfg. Co.,

Appellants,

vs.

DOUGLAS AIRCRAFT COMPANY (a corpora-
tion), and UNITED STATES OF AMERICA,

Appellees.

Upon Appeal from the District Court of the United States for
the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

LEO R. FRIEDMAN,

JOS. I. McMULLEN,

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FILED

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PAUL P. O'BRIEN,
CLERK

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No. 11,134

IN THE

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For the Ninth Circuit

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MANLOVE, co-partners doing business
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Appellants,

vs.

DOUGLAS AIRCRAFT COMPANY (a corpora-
tion), and UNITED STATES OF AMERICA,

Appellees.

Upon Appeal from the District Court of the United States for
the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

This is an appeal from a judgment rendered in favor of defendant corporation below in which action plaintiffs and appellants sought to recover from defendants a sum of money admittedly due for work and goods manufactured and delivered to defendant corporation. Defendant corporation refused to pay such amount, basing its refusal on a withholding order served on it by the Under Secretary of War, which order, in turn, was based upon a purported order, determining that appellants had made excessive profits, made under

authority of the Federal Renegotiation Act. Appellants contended that the Renegotiation Act was unconstitutional and void and the withholding order was also void and constituted no justification for the refusal of defendant to pay. Appellants asked for a declaratory judgment to the latter effect. The lower court refused to pass on the constitutionality of the Act and rendered judgment for defendant.

JURISDICTIONAL STATEMENTS.

The pleadings, facts and statutes conferring original jurisdiction upon the District Court of the United States and appellate jurisdiction upon this Court are as follows:

(1) Statutes Conferring Jurisdiction on the United States District Court.

The statute believed to sustain the jurisdiction of the United States District Court is as follows:

“The District Courts shall have original jurisdiction * * * Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3000 and (a) arises under the Constitution * * *, or (b) is between citizens of different States, * * *.”

28 *USCA*, Section 41, subdiv. 1;
Judicial Code, Section 24.

(2) Pleadings Showing the Existence of the District Court's Jurisdiction.

(a) The complaint, paragraph I (R. 2), alleges that each of appellants was and is a resident of the County of Los Angeles, State of California. Paragraph II of the complaint (R. 3) alleges that appellant, Douglas Aircraft Company, is a corporation organized and existing under the laws of the State of Delaware.

The answer of appellant Douglas Aircraft Company, in paragraphs IV and V (R. 22), admits the foregoing allegations of plaintiffs' complaint as also does paragraph XVI of the answer of the United States (R. 44).

(b) The complaint alleges the unconstitutionality of the Federal Renegotiation Act (R. 10-16). The answer of the Douglas Aircraft Company asserts the constitutionality of the Federal Renegotiation Act (R. 21) as does the answer of the United States (R. 38).

(3) The Statute Conferring Appellate Jurisdiction on the Circuit Court of Appeals.

28 *USCA*, Section 225; Judicial Code, Section 128; provides as follows:

“The circuit court of appeals shall have appellate jurisdiction to review by appeal final decisions—

“First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.”

(4) **The Federal Renegotiation Act, the Validity of Which Is Involved Herein.**

This suit questions the constitutionality of the so-called Federal Renegotiation Act, Section 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982, which Act is set forth in full in the appendix hereto.

STATEMENT OF THE CASE.

The facts of this case are undisputed. The matter was presented to the lower court upon the matters of fact set forth in the pleadings and the findings of fact of the lower court are correct as far as they go, save in one particular which consists of a mere omission of a letter from defendant corporation to plaintiff.

The action was commenced to recover from defendant corporation, Douglas Aircraft Company, a sum of money for goods, wares and merchandise manufactured, made, sold and delivered to defendant corporation from *March 1, 1944 to July 31, 1944.*¹

The complaint further alleged that defendant corporation refused to pay said sum solely for the reason that on May 1, 1944, Robert P. Patterson, Under Secretary of War, purporting to act under authority conferred on him by Section 801 of the Revenue Act of 1942 (the Renegotiation Act), had directed defendant corporation, by an order in writing "to withhold for the account of the United States any and all amounts (not in excess of \$110,000 in the aggregate) otherwise

¹Complaint, par IV; R. 3.

due or which shall become due from you to said Manlove and Spaulding Manufacturing Company'';² that said order was based upon a unilateral order and determination made by said Under Secretary of War purporting to determine under said Renegotiation Act that plaintiff, "during its fiscal year ended December 31, 1942" had made excessive profits in the sum of \$110,000.³

The complaint further alleged that an actual controversy existed between plaintiff and defendant in that defendant maintained and contended that by virtue of the order to withhold said funds, made by the Under Secretary of War, said defendant corporation was without right, power or authority to pay to plaintiff said sum sued for and, under said order, had no alternative save and except to withhold and on demand pay said amount to the United States. On the other hand, plaintiffs contended that said withholding order was null and void and of no force and effect, that said Renegotiation Act was and is in violation of the Constitution of the United States and of the Fifth and Tenth Amendments thereto, and constituted no justification for the defendant's refusal to pay.⁴

The complaint further set forth 14 grounds on each of which it contended that said Renegotiation Act was unconstitutional and void.⁵

Based upon the forgoing allegations, all of which are set forth at length in paragraph V of the com-

²Complaint, par. V(e); R. 9-10.

³Complaint, par. V(d); R. 6-8.

⁴Complaint, par. V(h); R. 16.

⁵Complaint, par. V(f); R. 10 to 14.

plaint,⁶ plaintiffs asked for a declaratory judgment decreeing that said Renegotiation Act was and is unconstitutional and void; that said withholding order was and is null and void and that said order purporting to determine excessive profits (under which said withholding order was made) was also null and void.

The two orders, one purporting to determine such excessive profits, the other the withholding order, are set forth in full in the complaint.⁷

The constitutionality of an Act of Congress being thus directly put in issue, the lower court, pursuant to a pertinent statute and by proper procedure, made its order allowing the United States to intervene solely for the purpose of presenting evidence and advancing arguments in support of the constitutionality of the Renegotiation Act.⁸

Both the defendant corporation⁹ and the United States¹⁰ appeared and filed answers. Each answer asserted the constitutionality of the Act.

Thereafter defendant corporation and the United States moved the lower court for summary judgment¹¹ "on the ground that there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law and on the further ground that the complaint fails to state a claim upon which relief can be granted. The court lacks jurisdiction to

⁶R. 4 to 17.

⁷R. 6, 9.

⁸R. 35.

⁹R. 20.

¹⁰R. 37.

¹¹R. 48.

try in this action any issue as to the amount of the excessive profits received by plaintiff."¹²

Thereafter the following stipulation was entered into by all parties to the action:

"It Is Hereby Stipulated and Agreed by and between the parties to this action that the amount of the alleged indebtedness from the defendant corporation, Douglas Aircraft Company, Inc., to plaintiff is the sum of \$27,580.80 as alleged in the answer of defendant, Douglas Aircraft Company, Inc., and not the sum of \$31,048.33 as alleged in paragraph IV of the complaint."¹³

The motion for summary judgment was based upon the pleadings, the affidavit of Robert P. Patterson¹⁴ and the affidavit of H. Struve Hensel.¹⁵ A counter affidavit of R. E. Spaulding, one of the plaintiffs, was filed in opposition to the motion.¹⁶

At the hearing of the motion for summary judgment, various stipulations were entered into as to matters of fact,¹⁷ all of which were correctly incorporated in the findings of fact set forth below.

The following counter motion for judgment was made by plaintiffs under the following circumstances:¹⁸

¹²Note that the complaint did not raise any question as to whether the amount of alleged excessive profits was correct; neither did it seek any re-determination thereof. The sole question raised was as to the constitutionality of the Act and the validity of the orders made under its purported authority.

¹³R. 219.

¹⁴R. 50.

¹⁵R. 130.

¹⁶R. 211.

¹⁷R. 253-261.

¹⁸R. 264-266.

"The Court: Why can't we agree to this? It seems to me, counsel, the best way is to submit it so that either side will have a right to appeal when we get through.

Mr. Lowry: If that is going to be done, your Honor, I think the way it should be handled is for Mr. Friedman to make a cross-motion for judgment. I, at least, feel a little uncertain when things aren't done in the procedures that the court has established.

Mr. Friedman: Isn't this a proper procedure: if your Honor said, 'All right, I will set this down for trial tomorrow——'

The Court: You can make it now if it is satisfactory to counsel.

Mr. Lowry: All right, make it.

The Court: An oral motion for judgment.

Mr. Friedman: Very well, your Honor. At this time, then, on behalf of the plaintiffs, and in view of the fact that as a result of the pre-trial conference all of the factual issues have been settled and agreed upon, I move at this time that judgment be entered in favor of the plaintiff for the amount set forth in the stipulation as to the amount due, upon the ground that the Act is unconstitutional and, therefore, the order which the defendant sets up as justification for not paying the amount admittedly due are without any force or effect, because the Renegotiation Act is unconstitutional and void because the unilateral order of determination runs counter to the Constitution and runs counter to the Act and, therefore, the withholding order is without any vitality or effect.

Mr. Lowry: Your Honor, may it be agreed that our briefs and our affidavits are submitted in

opposition to the motion that counsel has just made?

Mr. Friedman: I will add to my motion that all the papers, records, pleadings and stipulations now on file before the court be considered as part of the motion.

The Court: Satisfactory to counsel?

Mr. Lowry: That is satisfactory, your Honor.

The Court: That brings it right down to where a determination will place you both in a position where either one of you, if you so desire, can appeal.

Mr. Friedman: That was my idea in the matter. And may I add this, that the defendants and government raise no objection to the manner or form in which the motion is presented, that is, waive customary notice of presentation of such motions?

Mr. Lowry: We have no objection.

Mr. Friedman: And there is no objection to its being made orally, as suggested by the court?

Mr. Lowry: We have no objection to the form of the motion."

After the making of the foregoing counter-motion for judgment, a discussion took place between court and counsel in which all counsel agreed that, as the facts were without conflict, the only question before the court was the constitutionality of the Renegotiation Act. The judge of the lower court frankly announced that if he could find any way of disposing of the case, without passing on the constitutionality of the Act, he would follow such course. One of the trial judge's statements in this regard is as follows:

"The Court: The court has been very much interested in the whole subject matter and appre-

ciates the able manner that counsel on both sides have presented the case. The only difference between counsel, it seems to me, is that we have about three sides to this case, two parties and the court. The court is trying and is still going to try to decide this case without passing upon the constitutionality; I feel that it is **my duty**, and I have spent considerable time on that angle of the case. While you gentlemen have tried to force me right into the corner, I have been trying to find a way to get out of that corner. I want to tell you frankly if I can decide this case to my own satisfaction without passing on the constitutionality, I am going to do it.”¹⁹

After the submission of the cause the lower court made the following Findings of Fact:²⁰

“FINDINGS OF FACT.

1. That at all times herein mentioned each of the plaintiffs was a citizen of the State of California, a citizen and inhabitant of the County of Los Angeles in the District aforesaid, and that the business of the plaintiffs was being operated and conducted in said county of Los Angeles; that defendant was a corporation organized and existing under and by virtue of the laws of the State of Delaware and doing business within the Central Division of this District; and that the matter in controversy in this suit exceeds the sum or value of \$3,000.00, exclusive of interest and costs.

2. That at times herein mentioned defendant was engaged as a prime contractor with the

¹⁹R. 314.

²⁰R. 233-240.

Government of the United States in manufacturing airplanes for the Government in furtherance of the war effort; that plaintiffs were engaged in the manufacture of airplane parts for the defendant and others devoting approximately 100 per cent of its capacity to the production of war materials and obtaining the materials used by them in said manufacture through priorities.

3. That the defendant during the year 1942 entered into numerous subcontracts in the form of purchase orders with the plaintiffs for the manufacture, production and sale of mechanical fittings and parts in accordance with blueprints and specifications furnished by defendant, which purchase orders were given to and accepted by plaintiffs on the strength of bids submitted to defendant by plaintiffs as the result of competitive bidding in which plaintiffs and other firms and corporations participated; and that plaintiffs at all times knew that the parts manufactured by them for the defendant were to be used in the fabrication of airplanes for and at the expense of the Government.

4. That on or about November 14, 1942, plaintiffs addressed a letter to defendant (Exhibit B attached to defendant's answer) in the words and figures following, to-wit:

‘November 14, 1942

Douglas Aircraft Company, Inc.
Materiel Division
P. O. Box 9337, Station S.
Los Angeles, California

Subject: Renegotiation Clause

Gentlemen:

We have received your letter of September 14, 1942, on the subject of renegotiation.

We hereby agree that Special Conditions 42 and 42A printed on the reverse side hereof shall be applicable to all purchase orders which you issue to us under Army and Navy contracts respectively; provided, however, that this agreement shall cover only purchase orders in which you are required by law or by contract to insert such Special Conditions, and shall continue only so long as such requirement may be effective.

Yours sincerely,

Manlove & Spaulding

Mfg. Co.

(signed) By R. E. Spaulding

Partner'

That said Special Conditions 42 and 42A were and are in the words and figures following:

‘Special Condition No. 42—Renegotiation under
Army Contracts

(1) Upon the written demand of the Secretary, at such period or periods when, in the judgment of the Secretary, the profits accruing to Seller under this contract can be determined with reasonable certainty, the Secretary and Seller will renegotiate the contract price to eliminate there-

from any amount found as a result of such renegotiation to represent excessive profits. The demand of the Secretary shall fix a place for renegotiation and a time for the commencement thereof not later than one year after the date of completion or termination of this contract as found by the Secretary.

(2) Seller will furnish to the Secretary such statements of actual costs of production and such other financial statements, at such times and in such form and detail, as the Secretary may prescribe, and will permit such audits and inspections of its books and records as the Secretary may request.

(3) Any amount of the contract price found as a result of such renegotiation to represent excessive profits shall, as directed by the Secretary, (a) be deducted by Buyer from payments otherwise due to Seller under this contract; or (b) be paid by Seller directly to the Government.

(4) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount paid to the Government by Seller or deducted by Buyer from payments otherwise due under this contract, pursuant to directions from the Secretary in accordance with the provisions of this Article. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts withheld by it from Seller hereunder.

(5) As used in this Article:

(a) The term 'Secretary' means the Secretary of War or any duly authorized representative of the Secretary, including the contracting officer;

(b) The terms 'renegotiate' and 'renegotiation' have the same meaning as in Section 403 (b) of the Sixth Supplemental National Defense Appropriation Act, 1942;

(c) The term 'this contract' means this contract as modified from time to time.

(6) Seller agrees (a) to include in each fixed-price or lump-sum subcontract hereunder for an amount in excess of \$100,000 the foregoing sections (1) to (5) inclusive, and (b) to make no subdivisions of any contract or subcontract for the purpose of evading the provisions of this section, and (c) to repay to the Government the amount of any reduction in the contract price of any such subcontract which results from renegotiation thereof by the Secretary and which the Secretary directs the Seller to withhold from payments otherwise due under such subcontract and actually unpaid at the time the Seller receives such direction.

'The term "subcontract" includes any purchase order from or any agreement with Seller (i) to perform all or any part of the work to be done under this contract, or to make or furnish all or any part of any articles or structures covered by this contract, (ii) to supply any services required directly for the production of any articles or structures covered by this contract, or any component part thereof, not including services for the general operation of Seller's plant or business, (iii) to make or furnish any articles destined to become a component part of any article covered by this contract, or (iv) to make or furnish any articles acquired by Seller primarily for the performance of this contract, or

this contract and any other contract with the United States. The term "articles" includes any supplies, materials, machinery, equipment or other personal property.'

Special Condition No. 42A. Renegotiation under
Navy Contracts

'(a) At any time, when in the judgment of the Secretary, the profits accruing to Seller under this Purchase Order can be determined with reasonable certainty, the Secretary and Seller, upon the written demand of the Secretary, will renegotiate the price with a view to eliminating such profits as are found as a result of such negotiation to be excessive.

(b) In the event that such renegotiation results in a reduction of the price, the amount of such reduction shall, as may be directed by the Secretary, be deducted by Buyer from payments to Seller under this Purchase Order; or be paid by Seller directly to the Government; or be repaid by Seller to Buyer.

(c) Seller agrees that Buyer shall not be liable to Seller for or on account of any amount repaid to Buyer or paid to the Government by Seller or deducted by Buyer from payments to Seller pursuant to directions from the Secretary in accordance with the provisions hereof. Under its contract with the Government, Buyer is obligated to pay or credit to the Government all amounts repaid by or withheld from Seller hereunder.

(d) The term "Secretary" as used herein means the Secretary of the Navy and his duly authorized representatives.'

Thereafter defendant continued to issue such orders to plaintiffs and plaintiffs continued to perform the same.

5. That on February 2, 1944, Robert P. Patterson, Under Secretary of War, acting pursuant to the Renegotiation Act, as amended, duly made a unilateral order (in the words and figures set out in paragraph V(d) of the complaint) determining that \$110,000.00 of the profits realized by plaintiff during its fiscal year ending December 31, 1942, under its subcontracts subject to renegotiation pursuant to said Act are excessive; and thereafter on May 1, 1944, said Robert P. Patterson, Under Secretary of War, duly directed defendant by an order in the words and figures set out in paragraph V(e) of the complaint to withhold for the account of the United States any and all amounts (not in excess of \$110,000.00 in the aggregate) otherwise due or which shall become due from defendant to plaintiffs. That pursuant to said direction defendant withheld from plaintiffs for the account of the United States the sum of \$27,580.80 for the recovery of which amount this suit was instituted by plaintiffs. It is admitted that defendant's refusal to pay plaintiffs the amount so withheld is based solely on the withholding order issued by the Under Secretary of War and plaintiffs admit that if the Renegotiation Act is constitutional they have no cause of action. Defendant and intervenor admit that if the Renegotiation Act is unconstitutional, plaintiffs should recover and judgment should be for the plaintiffs.

6. That all of the business done by plaintiffs during the fiscal year ending December 31,

1942, was with private firms, corporations and individuals and none of such business was done on prime contracts with the United States of America. All the individual orders and contracts of plaintiffs for the year 1942 varied in amounts from 60 cents to \$8000.00 each.

7. That plaintiffs have not filed a petition for redetermination of its excessive profits in the Tax Court of the United States and the time for filing that petition has expired.

8. That there is no genuine issue between the parties as to any material fact and defendant is entitled to judgment as a matter of law.

9. That on September 12, 1944, the Court certified to the Attorney General, pursuant to the Act of August 24, 1943, 28 U.S.C.A. 401, the fact that the constitutionality of the Renegotiation Act, an Act of Congress affecting the public interest, was drawn in question herein and thereafter and on December 18, 1944, an order was made allowing intervention by the United States and directing that the United States be made a party to the cause.

10. That the amounts sued for by plaintiffs in the complaint herein represented work done by plaintiffs for defendant from the 1st day of March, 1944, to and including the 31st day of July, 1944, and did not comprise any work done by plaintiffs for defendant during the fiscal year ending December 31, 1942, and the amount thereof was and is in the stipulated and agreed sum of \$27,580.80."

The findings of fact were followed by the court's conclusions of law²¹ (hereinafter set forth) and directing that judgment be entered in favor of defendant.

Judgment was entered on July 30, 1945, as follows:

"Ordered and Adjudged that plaintiffs take nothing by their suit; and that defendant, Douglas Aircraft Company, Inc., do have and recover from the plaintiffs its costs and charges in this behalf expended and have execution therefor."²²

From the foregoing judgment plaintiffs have prosecuted this appeal.

SPECIFICATION OF ERRORS RELIED UPON BY PLAINTIFFS.

I.

The District Court erred in making the following conclusion of law:

"1. The agreement between the parties with reference to incorporation in purchase orders of Special Conditions 42 and 42A establishes an agreement on behalf of the plaintiffs to be bound by the Renegotiation Act and thereby said agreement became a part of every purchase order, notwithstanding anything therein to the contrary; the parties having thus contracted, it becomes immaterial whether the Act is constitutional or not. Therefore, the parties by their own contract have eliminated the constitutional question."²³

²¹R. 240.

²²R. 242.

²³R. 240.

The foregoing conclusion is erroneous in each of the following particulars:

(a) It is not supported by the findings of fact and is directly contrary thereto. Finding of Fact No. 4²⁴ sets forth the letter of plaintiffs to defendant and this letter limits any renegotiation to contracts entered into with defendant and not by plaintiffs with anyone else. The Order purporting to determine excessive profits deals only with the year ending December 31, 1942, and is based *on all business done by plaintiffs during that year*; it is not confined solely to business done with defendant.

(b) The letter, if binding at all on plaintiffs, only consents to such clauses 42 and 42A being made part of any purchase order "in which you (defendant corporation) are required by law or by contract to insert such special conditions". The Renegotiation Act provides that such special conditions shall only be inserted in sub-contracts of \$100,000 or more.²⁵ No contract of plaintiffs during the year 1942 exceeded the sum of \$8000;²⁶ therefore, special conditions 42 and 42A never became a part of any contract with or purchase order placed by defendant corporation.

(c) The conclusion that "it becomes immaterial whether the Act is constitutional or not", is contrary to both the facts as found and the law. The special conditions purport to confer upon a secretary (of a

²⁴R. 234.

²⁵Section 403 (b) (3) of the Sixth National Defense Appropriation Act, as amended by Revenue Act of 1942, Section 801 thereof.

²⁶Finding of Fact 6, R. 239.

government department) the power to renegotiate contracts entered into between plaintiffs and private individuals—contracts to which the United States was not a party. If the Act is unconstitutional, this amounts to an agreement to confer jurisdiction on the government by consent. Jurisdiction must exist as a matter of law and cannot be conferred by consent. Besides, the incorporation of such special conditions did not affect the contracts of plaintiff and defendant. Defendant could not resort thereto and renegotiate the contract price—a price accepted after competitive bidding. Neither could the defendant derive any benefit from such renegotiation. The Act being unconstitutional, an agreement to be bound by its terms, to which agreement the United States was not a party and which agreement could not be enforced by the defendant, could not confer such power on the United States and the parties have not by such agreement “eliminated the constitutional question”.

II.

The District Court erred in making the following conclusion of law:

“2. The agreement between the parties with reference to incorporation in purchase orders of Special Conditions 42 and 42A, the conduct of plaintiffs in continuing thereafter to accept purchase orders from the defendant and to perform the same creates an estoppel and thereby plaintiffs have waived their right to assert the unconstitutionality of the Renegotiation Act and are estopped at this late date to retain any excessive

profits. Having accepted the benefits of said purchase orders, they are not now in a position to avoid the terms under which said purchase orders were issued and received.”²⁷

The foregoing conclusion of law is erroneous in each of the following particulars:

(a) This conclusion of law is, in effect, a restatement of the conclusions set forth in Conclusion of Law No. 1 and each of the reasons set forth as to the error of Conclusion of Law No. 1 are hereby referred to and advanced as to the error of Conclusion of Law No. 2.

(b) This second conclusion of law seeks to set up the doctrine of estoppel as preventing plaintiffs from asserting the unconstitutionality of the Act. Neither the doctrine of estoppel can be thus resorted to nor does the same apply. Estoppel arises when a party, by his act or conduct has led another party to do something which otherwise he would not have done and thus altered his position to his prejudice. Under such circumstances equity will not permit the first party to repudiate his act and thus gain an unfair advantage over the second party. Here, there was no act of plaintiffs which led defendants to do an act to its disadvantage. Whether plaintiffs insisted on or waived the constitutionality of the Act could not change the position of defendant. Be the Act void or valid defendant by its contract was legally bound to pay to plaintiff the agreed amount for the goods manufactured and delivered to it by plaintiffs.

²⁷R. 241.

law as announced in the case of *Coffman v. Breeze Corporations, Inc., supra*. In a suit to recover money under a contract, where the refusal to pay is based on an Act of Congress, the question of the constitutionality of the Act is directly before the court and must be decided.

VI.

The District Court erred in refusing to determine and adjudge that the Renegotiation Act is unconstitutional.

VII.

The District Court erred in denying the motion of plaintiffs for judgment.

VIII.

The District Court erred in granting the motion of defendant for judgment and in rendering judgment for defendants.

Each of the foregoing assignments of error were set forth in the "statement of points on which appellants intend to rely on appeal" as filed in the lower court³¹ and in "appellants' statement of points intended to be relied on" in this Court.³²

³¹R. 245.

³²R. 317.

ARGUMENT.

1. THE RENEGOTIATION ACT AND AMENDMENTS THERETO.

The Act of Congress involved herein, known as the "Renegotiation Act," is Title VIII of the Revenue Act of 1942 (Public Law 753, 77th Congress, 2d Session; 56 Stat. 798, 982. This Act is set forth in full in the appendix hereto. The original Renegotiation Act was enacted as Section 403 of the Sixth Supplemental National Defense Appropriation Act (56 Stat. 226, 245) and has undergone various amendments by subsequent Congressional action.

Believing that a correlation of these various acts will be of material assistance to the court, we here set forth the pertinent provisions of the original Act and the amendments thereto.

That Act was originally enacted April 28, 1942. The court here will be primarily concerned with the Act in its original form, and only incidentally with the later amendments. As originally enacted, the statute was made applicable only to contracts and subcontracts of the War and Navy Departments and the Maritime Commission. Other agencies have been added by subsequent amendments, but the scheme of the statute with respect to renegotiation remains essentially the same. "Renegotiation" is defined by the statute³³ as "the refixing by the Secretary of the Department of the contract price."

³³Section 403 of the Sixth Supplemental National Defense Appropriation Act, Public Law 528, 77th Congress, 56 Stat. 226, 245, effective April 28, 1942, 50 U. S. C. 1191.

Here Under Secretary of War Patterson purported to act under Subsection (c) of the statute, which says:³⁴

“The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor.”

The statute was expressly made applicable (Subsection (c)):

“to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.”

The power so given to the Secretary, the statute provided (Subsection (f)):

“may be delegated, in whole or in part, by him to such individuals or agencies in such Depart-

³⁴56 Stat. 226, 245.

ments as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.”

The statute was amended October 21, 1942, within the period here in controversy,³⁵ so as to add the Treasury Department to the renegotiating agencies. The other amendments then made, so far as is here material, all of which were declared to be “effective as of April 28, 1942,” were these:

1. The statute for the first time undertook to define “excessive profits,” but in legal effect added nothing to the statute because it merely said “‘excessive profits’ means * * * excessive profits.” The language is this:³⁶

“‘excessive profits’ means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.”

2. The statute for the first time included a definition of a subcontract. The original Act mentioned, but did not in any way disclose what was to be embraced within, subcontracts.³⁷ The October, 1942 amendment defined “subcontract” to mean:

“any purchase order or agreement to perform all or any part of the work, or to make or fur-

³⁵By Section 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982.

³⁶Section 801(a); 56 Stat. 798, 982.

³⁷The original Act merely said (Section 403(a); 56 Stat. 226, 245):

“the term ‘contract’ includes a subcontract and the term ‘contractor’ includes a subcontractor.”

nish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property."

3. The statute authorized the Secretary "when the contractor or subcontractor holds two or more contracts or subcontracts," to:

"renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract."

4. The statute authorized the Secretary to make his determination effective by, among other methods:

"directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract,"

or by any combination of the several methods mentioned in the statute.

*The statute was amended a second time on July 1, 1943.*³⁸ The only change made was to add to the Renegotiation Act, contracts and subcontracts of:

Defense Plant Corporation;
Metals Reserve Company;
Defense Supplies Corporation;
Rubber Reserve Company.

³⁸By Section 1 of the Military Appropriation Act, 1944, Public Law 108, 78th Congress, 57 Stat. 347.

The third amendment was made July 14, 1943.³⁹ It merely added to the contracts subject to renegotiation, the so-called war brokers' contracts "under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder * * *." This amendment is not here important.

The fourth amendment is that made by the Revenue Act of 1943,⁴⁰ which became effective February 25, 1944. Substantial revisions were then made but for the most part they are presently unimportant⁴¹ because not made applicable to the year 1942, with which the court here is concerned. For example, for the first time the statute undertook to specify standards and considerations to be taken into account in determining whether "excessive" profits exist. These provisions are, however, by express command of the statute made applicable only to fiscal years ending after June 30, 1943. They, therefore, do not apply to this case.

The 1944 amendments, in Section 403(e) (2), undertake to provide for redetermination in the Tax Court of an asserted renegotiation liability. It provides that one:

³⁹By Public Law 149, 78th Congress, 57 Stat. 564.

⁴⁰Public Law 235, 78th Congress, 58 Stat. 21, 78.

⁴¹On the Constitutional issues, now brought before the Court, these amendments are highly important in that they disclose that Congress, by providing standards for the guidance of the Secretary, a hearing, and findings, and in other respects, has sought to cure for the future the features of unconstitutionality inherent in the original Act.

“aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943 [that is to say, prior to February 25, 1944], with respect to a fiscal year ending before July 1, 1943,”

may file a petition with the Tax Court “for a re-determination thereof.”

-
2. **THE DISTRICT COURT ERRED IN CONCLUDING THAT THE LETTERS MAKING SPECIAL CONDITIONS 42 AND 42A A PART OF EACH ORDER PREVENTED AND ESTOPPED PLAINTIFFS FROM ASSERTING THE UNCONSTITUTIONALITY OF THE RENEGOTIATION ACT.**

The lower court made two conclusions of law, summed up in the foregoing heading, which read as follows:

“1. The agreement between the parties with reference to incorporation in purchase orders of Special Conditions 42 and 42A establishes an agreement on behalf of plaintiffs to be bound by the Renegotiation Act and thereby said agreement became a part of every purchase order, notwithstanding anything therein to the contrary; the parties having thus contracted, it becomes immaterial whether the Act is constitutional or not. Therefore, the parties by their own contract have eliminated the constitutional question.”⁴²

“2. The agreement between the parties with reference to incorporation in purchase orders of Special Conditions 42 and 42A, the conduct of plaintiffs in continuing thereafter to accept pur-

⁴²R. 240.

chase orders from the defendant and to perform the same creates an estoppel and thereby plaintiffs have waived their right to assert the unconstitutionality of the Renegotiation Act and are estopped at this late date to retain any excessive profits. Having accepted the benefits of said purchase orders, they are not now in a position to avoid the terms under which said purchase orders were issued and received.”⁴³

The lower court, in Finding of Fact No. 4,⁴⁴ sets forth the letter of plaintiffs to defendant under date of November 14, 1942. The findings do not set forth the letter of defendant to which plaintiff's letter was a reply. We set forth both letters for the convenience of the court omitting the Special Conditions which were printed on the reverse side of plaintiff's letter. These Special Conditions are set forth in Finding of Fact No. 4 and which we printed in full in our statement of the case, *supra*.

⁴³R. 241.

⁴⁴R. 234.

Douglas Aircraft Company, Inc.
Santa Monica, California

September 14, 1942

Cable Address "Douglasair"

In reply refer to File G305NM

Mailing Address: Materiel Division, P. O. Box 9337,
Station S. Los Angeles, California.

To All Vendors:

Subject: Renegotiation Clause

Gentlemen:

You are probably familiar with Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public Law 528, 77th Congress, approved April 28, 1942). This is the statute prescribing renegotiation for government contracts and subcontracts thereunder.

Section 403 requires us to insert a renegotiation clause in each subcontract involving more than \$100,000, and the provisions of some of our more recent contracts define "subcontract" as including practically everything we buy. Furthermore, we suspect that we should insert it in each purchase order, since the total orders to any firm under a given contract may aggregate more than \$100,000. Therefore, we believe that, for safety's sake, we should insert a clause in every purchase order. It is much simpler to do this by means of a blanket agreement than by attaching the clause to each order. Hence we are enclosing two copies of such a blanket agreement, with the request that you execute one and return it to us.

As we construe Section 403, the statute is applicable to all orders, though the clause need be inserted only when more than \$100,000 is involved. Therefore we are not altering your rights or liabilities by this blanket agreement, which is only a declaration of your present position. Your execution of it is thus only a formality, but it is a formality which the Government seems to desire and which we are trying to make as painless as possible.

Yours sincerely,
Douglas Aircraft
Company, Inc.

(signed) D. J. Bosio
Chief of Materiel Division

NM:lm

Enc.

First Around the World

November 14, 1942

Douglas Aircraft Company, Inc.

Materiel Division

P. O. Box 9337, Station S.

Los Angeles, California

Subject: Renegotiation Clause

Gentlemen:

We have received your letter of September 14, 1942, on the subject of renegotiation.

We hereby agree that Special Conditions 42 and 42A printed on the reverse side hereof shall be appli-

cable to all purchase orders which you issue to us under Army and Navy contracts respectively; provided, however, that this agreement shall cover only purchase orders in which you are required by law or by contract to insert such Special Conditions, and shall continue only so long as such requirement may be effective.

Yours sincerely,

Manlove & Spaulding Mfg. Co.

(signed) By R. E. Spaulding

Partner

Note: Execution should be by an authorized officer or a general partner.

In Purch. Nov. 16, '42 AM

The two foregoing conclusions of law of the lower court are contrary to both the law and the facts, for each of the reasons hereinafter set forth, and did not justify the lower court in refusing to determine the constitutionality of the Act in question.

- (a) **The Letters Were Not an Unqualified Adoption of the Renegotiation Act, But Limited the Effect Thereof to the Class of Contracts Specified in the Letter of Plaintiffs.**

The lower court concluded that the letters constituted an agreement and "thereby became a part of every purchase order". This conclusion is manifestly erroneous.

The letter of plaintiffs contains the following express reservation and proviso:

"* * * provided, however, that *this agreement shall cover only purchase orders in which you are required by law or by contract to insert such*

Special Conditions, and shall continue only so long as such requirement may be effective.”⁴⁵

The Renegotiation Act is explicit as to the kinds of subcontracts in which prime contractors must insert such conditions.

Section 403(b) (1) and (3) of the Act specifically provides as follows:

“(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of \$100,000 hereafter made by such Department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; * * *

(3) a provision requiring the contractor to insert in *each subcontract for an amount in excess of \$100,000* made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract * * *.”

The agreement cannot be extended beyond the express terms of the proviso in plaintiff's letter, which proviso limited the inclusion of the Special Conditions to subcontracts in which defendant either by law or contract, was required to insert a provision for the renegotiation of the contract price, viz.: contracts “in excess of \$100,000”.

⁴⁵All italics appearing in quotations in this brief, including court decisions, unless otherwise noted, have been supplied by the writers.

It must be noted that the withholding order of the Under Secretary of War was based solely on the order determining excess profits for the year ending December 31, 1942. The lower court expressly found as follows:

“6. That all of the business done by plaintiffs during the fiscal year ending December 31, 1942, was with private firms, corporations and individuals and none of such business was done on prime contracts with the United States of America. *All the individual orders and contracts of plaintiffs for the year 1942 varied in amounts from 60 cents to \$8,000.00 each.*”⁴⁶

Assuming, without conceding, that the parties by letters could have eliminated the question of the validity of the Act, it must be concluded that they did no such thing. The agreement was restricted to a contract involving \$100,000 or more, there never was such a contract or any contract in excess of \$8000. It follows that the conclusion reached by the lower court was erroneous, and the parties did not eliminate the constitutional question.

(b) The Letter Applied Only to Contracts Between Plaintiffs and Defendant. It Did Not Apply to Contracts Between Plaintiffs and Any Other Person or Firm.

Disregarding for the moment the preceding point, the lower court erred in its conclusion that plaintiffs could not raise the constitutional question.

The order purporting to determine that plaintiffs made excessive profits during the year 1942,⁴⁷ is based

⁴⁶R. 239.

⁴⁷R. 6.

upon all the business done by plaintiffs with all of its customers. The letter on which the lower court based its conclusions could only apply to business done with defendants. There never was any purported or other renegotiation of the orders placed by defendant with plaintiffs. These orders may have been, even in the opinion of the Secretary, fair and reasonable and not excessive as to profits.

Even if we assume that such letter authorized the Secretary to renegotiate the orders placed by defendant with plaintiffs, by no stretch of the imagination can such letter be construed as an authorization for the Secretary to renegotiate all of the business done by plaintiffs. As plaintiffs never agreed that a renegotiation of all its business for the year should be done by the Secretary, they have the right—which they never surrendered—to protest the validity of such action by the Secretary.

(c) The Letter Was Not Retroactive But Only Prospective in Operation.

The conclusions of the lower court imply that the letter of plaintiffs—dated November 14, 1942—was retroactive and constituted an agreement that renegotiation could be made of all plaintiffs' business for the entire year of 1942.

The letter refers only to orders to be issued in the future. It, therefore, can have no application to any subcontracts to which plaintiffs were a party during the ten and one-half months preceding the writing of the letter. The order determining excessive profits covers the entire year of 1942. As the Government had

no power, arising from the letter, so to do, the plaintiffs are not prevented from questioning the attempt to exercise such power and asserting the unconstitutionality of the Act.

Furthermore, there is nothing in the entire record to show that defendant placed any orders with plaintiffs between November 14, 1942 and January 1, 1943.

(d) The Letter Did Not Constitute an Agreement That Plaintiffs Should Be Bound by the Renegotiation Act as to Every Order Placed by Defendant and Did Not Eliminate the Constitutional Question.

The lower court concluded that the letter of November 14, 1942, was tantamount to a private contract between the parties "agreeing that all work orders would be filled and the charges therefore would include no excessive profits, leaving the determination of excessive profits solely and exclusively to arbitration by a third party" (a government agency).⁴⁸ This conclusion is erroneous in many particulars.

The letter was not an agreement applying to all work orders. It applied only to individual orders amounting to \$100,000 or more.

The letter did not apply to any orders placed prior to November 14, 1942.

The letter was not an agreement for arbitration of the price arrived at by competitive bidding. If all such orders given as the result of competitive bidding were subject to arbitration, then the competitive bidding became a mere matter of words without any force

⁴⁸R. 224, Opinion of District Judge.

or effect. Defendant, under a like agreement, could have given the work to anyone and later had the contract price readjusted *downward* (the Act does not allow for a raise in the contract price as the result of renegotiation) merely by insisting on such arbitration under the guise of renegotiation.

However, the defendant could not avail itself of such arbitration by renegotiation. *Defendant was given no power to renegotiate.* The power to renegotiate is with the Secretary of a Department and this he may or may not do according to his whim. On renegotiation no refund is made to the defendant, the money is turned into the Treasury of the United States.

Under renegotiation defendant would not be relieved of paying the entire contract price, but would have to pay the entire price in part to plaintiffs and the balance to the United States.

No matter which way the letter is construed, it cannot be construed as either a condition or agreement operating in favor of the defendant or one that the defendant could enforce in any manner. Thus, the entire premise of the lower court's conclusion falls to the ground.

(e) The Letter Could Not Confer on the Government the Power to Do That Which Under the Law It Could Not Do.

The lower court's conclusion is that by agreement between private parties they conferred on the Government the power (at the Government's option, uncontrolled by either party) to interfere with the obligation of a private contract. Under the Constitution the

Government cannot interfere with the obligation of a private contract or rights of either party to such contract.

To avoid repetition we refer the court to our argument on this point later in this brief, where the matter is discussed under the unconstitutionality of the Act.

Jurisdiction or power to proceed and determine cannot be created or conferred by consent or agreement of the parties. This rule applies to all public officers whether judicial, executive or ministerial.

Neff v. Redmond, 54 Cal. App. 757, 759, 202 Pac. 955.

(f) Plaintiffs Have Neither Waived the Right Nor Are Estopped From Asserting the Unconstitutionality of the Act.

The lower court concluded that plaintiffs, by their letter and acceptance of orders from defendant, had waived their right to assert the unconstitutionality of the Act and are estopped to retain any excessive profits. (Conclusion of Law No. 2, supra.)

This conclusion is, in effect, but a restatement of Conclusion of Law No. 1, heretofore discussed, and all the arguments advanced as to the erroneousness of that conclusion apply with like force to Conclusion of Law No. 2.

Estoppel, either by contract, act or statement, is a mutual transaction, on the one side being the person making the act or statement and on the other side being the person who acted upon such act or statement. Estoppel never operates in favor of a third

person who is a stranger to and not in privity with any party to the original bilateral transaction.

Estoppels to be good must be mutual (*Litchfield v. Crane*, 123 U. S. 549, 31 L. ed. 199). No estoppel arises in favor of one not a party to the transaction or in privity with a party thereto (*Deery v. Cray*, 72 U. S. 795, 18 L. ed. 653, 655).

In *Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154, 157, it is stated:

“We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an Act of the Legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law today, and not a law tomorrow; a law in one place, and not a law in another in the same State. And whether it be a law or not a law is, a judicial question, to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case.”

In the case at bar neither plaintiffs or defendants could have insisted on a refixing of each contract price by renegotiation. There was no mutuality in the transaction. The Government was not a party. The conclusion of the lower court is erroneous.

3. THE DISTRICT COURT ERRED IN CONCLUDING THE ACTION WAS ONE THAT HAD TO DO WITH JUDICIAL INTERFERENCE WITH CONGRESSIONAL OR EXECUTIVE ACTION IN EXPENDING PUBLIC FUNDS.

The lower court made the following conclusion of law:

“3. This action presents no justiciable controversy for the reason that this Court has no power to interfere with the exercise by Congress of its conditional power to prescribe and define the terms and conditions under which the Executive Department of the Government may expend moneys appropriated by the Congress.”⁴⁹

Granted that the Judiciary cannot interfere with congressional action in defining the conditions under which the Executive Department can expend public moneys, where such expenditure and the terms and conditions relative thereto are lawful and the power is exercised in a lawful and constitutional manner, it does not follow that the courts are impotent to so interfere where the power is exercised in a manner or for an end prohibited by the Constitution.

If the conclusion reached by the lower court were sound, *then the Judiciary could never declare any Act of Congress as being in violation of the Constitution if it dealt with the expenditure of public funds or prescribed the terms and conditions under which some other branch of the Government was to disburse such funds, even though the Act ran counter to the Constitution.* Such is not the law.

⁴⁹R. 241.

Here, we have no question of judicial interference with the exercise by Congress of its power to appropriate and expend public moneys, nor with prescribing the conditions under which a branch of the Government shall disburse such funds. We have here no question of contract between the Government and a contractor—a prime contract. Whether defendants, in a prime contract with the Government, are barred or estopped from questioning the validity of the Act is not a question in the case. The instant case deals with private contracts between private individuals—contracts to which the United States is not a party.

The instant case *has not to do with the expenditure of public moneys*, but deals directly with *taking by the Government of money* admittedly due to plaintiffs from defendant under a private contract.

That such an action on the part of the Government does not fall within the realm of expenditure of money or interference by the Judiciary with Executive action as to the terms under which such public moneys shall be disbursed, is directly and completely answered by a decision of the Supreme Court rendered this year.

The case of *Coffman v. Breeze Corporations, Inc.*, 323 U. S. 316, 65 Sup. Ct. (Ad. Op.) 303, 89 L. ed. (Ad. Op.) 255,⁵⁰ had to do with the *Royalty Adjustment Act* of October 31, 1942 (56 Stat. 1013; 35 USCA secs. 89-96). Coffman, the owner of a United States patent, entered into an agreement licensing Federal to manufacture and sell the patented device at a royalty

⁵⁰We here quote extensively from the case as it is peculiarly applicable to and controlling of another point hereafter discussed.

of 6% of the licensee's selling price. Thereafter Breeze Corporations acquired all the rights of Federal. Thereafter Breeze became engaged in supplying the War and Navy Departments with the patented device under Government contracts.

The Supreme Court summarized the Royalty Adjustment Act as follows:

“The Royalty Adjustment Act provides that whenever a patented device is ‘manufactured, used, (or) sold * * * for the United States’ under a license stipulating for payment of royalties ‘*believed to be unreasonable or excessive*’ by the head of the government agency concerned, he ‘shall give written notice of such fact to the licensor and to the licensee’. It provides that within a reasonable time thereafter the head of the agency ‘*shall by order fix and specify such rates or amounts if any, as he shall determine are fair and just, taking into account the conditions of wartime production.*’ The Act directs the licensee, after the effective date of the notice, not to ‘pay to the licensor, nor to charge directly or indirectly to the United States a royalty, if any, in excess of that specified in said order * * *’.

“* * * By § 4 any reduction in royalties authorized by the Act is to ‘inure to the benefit of the Government by way of a corresponding reduction in the contract price to be paid * * * or by way of refund if already paid to licensee.’ ”

The Supreme Court then states the following things were done by the War and Navy Departments:

“In December 1943, the War and Navy Departments issued royalty adjustment orders under § 1

of the Act, purporting to reduce to specified amounts, declared to be '*fair and just*', the royalties accruing on the manufacture and sale of the patented device for the War and Navy Departments, with maximum royalties of \$50,000 per year commencing January 1, 1943. The orders further directed Federal and Breeze to pay to the Treasurer of the United States 'the balance in excess' of the royalty payments authorized by the orders 'which were due to Licensor and were unpaid on the effective date' of the notice, or which might thereafter become due to the licensor."

(Note how parallel are the provisions of the Royalty Adjustment Act and the procedure of the government departments thereunder with the provisions of the Renegotiation Act and the course followed by the Under Secretary of War.)

Large amount became due to Coffman as royalties under his license agreement, which Federal and Breeze refused to pay. Coffman then brought suit in equity in the District Court to enjoin Federal and Breeze from paying his royalties into the Treasury of the United States under said orders of the War and Navy Departments and asking for a declaratory judgment determining that the Royalty Adjustment Act was unconstitutional and offered no justification for the refusal to pay. The validity of an Act of Congress being in issue the Government was allowed to intervene. The District Court held there was no justiciable issue before the equity side of the court. The Supreme Court upheld the action of the lower court on the ground that *Coffman had an adequate remedy at law*

in a suit against Federal and Breeze to recover his royalties under the license agreement *and in that suit the validity of the Act, if set up as a defense, would be a justiciable issue in the case.* The Supreme Court's language follows:

“Appellant does not in the present suit bring to our attention any facts showing or tending to show that a suit to recover a money judgment for the royalties would not afford complete and adequate relief without resort to an equitable remedy. *In such a suit if appellee Breeze is obligated by the contracts in question to pay the royalties to appellant, he can discharge that obligation only by payment of the amount due, or by setting up the Royalty Adjustment Act as a defense.* Compliance with the duty under the Act to pay into the Treasury the royalties withheld from appellant would operate by the terms of the Act as a discharge of the obligation to pay appellant. *If that defense were offered, the constitutional validity of these provisions of the Act would be a justiciable issue in the case, since upon its adjudication would depend appellant's right of recovery.*

“But whether the provisions of the Act be valid or invalid appellants show no ground for equitable relief. *If valid they would be a defense, and appellant would be entitled to no relief * * *. If invalid, appellant's right to recover remains unimpaired.* The sufficiency of the defense may be as readily tested in a suit at law to recover the payment of the royalties as by the present suit in equity to enjoin payment of the royalties into the Treasury.”

The foregoing case *answers all the conclusions* erroneously made and arrived at by the lower court. The *Coffman* case had more to do with the power of Congress to appropriate money and prescribe the conditions under which it should be expended than does the case at bar, which does not involve such a question at all.

The instant suit was one at law to recover money due under a contract. The defense offered was the validity of the Renegotiation Act. If the Act be valid, plaintiffs cannot recover. If invalid, they are entitled to judgment for the full amount admittedly due. It was the duty of the lower court to pass upon this question.

That the theory upon which the case was submitted to the lower court by all parties was in strict accord with the rule announced in the *Coffman* case, appears from the lower court's Finding of Fact No. 5, which reads in part as follows:⁵¹

“It is admitted that defendant's refusal to pay plaintiffs the amount so withheld is based solely on the withholding order issued by the Under Secretary of War and plaintiffs admit that if the Renegotiation Act is constitutional they have no cause of action. Defendant and intervenor admit that if the Renegotiation Act is unconstitutional, plaintiffs should recover and judgment should be for plaintiffs.”

⁵¹R. 239.

4. **THE DISTRICT COURT ERRED IN HOLDING THAT THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.**

Conclusion of Law No. 4, reading as above, is erroneous for all of the reasons heretofore advanced and argued and particularly under the doctrine announced in the case of *Coffman v. Breeze Corporations, Inc.*, *supra*.

5. **THE DISTRICT COURT ERRED IN DENYING THE MOTION OF PLAINTIFFS FOR JUDGMENT.**

As pointed out above, plaintiff moved the court for judgment on the ground that the money was admittedly due and, as the Renegotiation Act was unconstitutional it offered no justification for defendant's refusal to pay the money (R. 8-10). As the Act is unconstitutional, as hereinafter demonstrated, the lower court erred in not granting the motion and ordering judgment entered for plaintiffs in the stipulated amount.

6. **THE ACT IS VOID AS CONSTITUTING AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER.**

The Constitution vests in the Congress all law making power (Art. I, sec. 1). In delegating to the Congress the power to make laws, it was the intention of the framers of the Constitution that this power should be exercised by the Congress in order to maintain our system of checks and balances and keep distinct the branches of our Federal Government. Indeed, the inability of Congress to delegate any of its

legislative powers to executive, judicial or administrative branches of the Government has never been doubted. As was said in *Panama Refining Company v. Ryan*, 293 U. S. 388, 421, 79 L. ed. 446, 459:

“The Constitution provides that ‘All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.’ Art. 1, § 1. And the Congress is empowered ‘To make all laws which shall be necessary and proper for carrying into execution’ its general powers. Art. 1, § 8, p. 18. *The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested.*”

While it is true that in exercising its legislative power the Congress is not required to go into minute details covering every possible combination of facts and circumstances, it, nevertheless, must provide in its enactment both a definite policy and definite standards. It is only when legislation contains these two essential factors that Congress can leave to some other branch of the Government the administration of the enactment, the making of rules for carrying it into effect and the power to find and fix the instances in which it shall become operative. In the *Panama Refining Company* case, *supra*, the Supreme Court announces this rule as follows:

“Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been re-

garded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it *to perform its functions in laying down policies and establishing standards*, while leaving to selected instrumentalities *the making of subordinate rules within prescribed limits* and the determination of facts to which the policy as declared by the legislature is to apply. * * * But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, *cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.*"⁵²

Later in the same decision it is stated:

"Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, *the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.*"⁵³

Even if we assume, for purposes of argument, that the Congress had the power to legislate on the ques-

⁵²*Panama Refining Co. v. Ryan*, 293 U. S. at 421, 79 L. ed. at 459.

⁵³*Panama Refining Co. v. Ryan*, 293 U. S. at 430, 79 L. ed. at 464.

tion of the United States being able to renegotiate contracts entered into between third parties and that it had the power to prohibit the earning of large profits and, in pursuance of such power, it could delegate to executive and administrative bodies the power to provide the mechanics for carrying into effect such legislation, the Renegotiation Act fails to comply with those requirements set forth above.

The unilateral order and determination of so-called excessive profits involved herein was made on February 2, 1944, more than two months before the Revenue Act of 1943 became a law. Thus the validity of the order and the law under which it was made must be determined by the terms of the original Act and its amendments as they existed on February 2, 1944.

A mere reading of the Act should demonstrate that the Congress therein "has established no standard, has laid down no rule" by which there is to be determined what are "excessive profits". The determining of what are "excessive profits" is left entirely to the arbitrary action, whim or caprice of executive officers.

Section 403(a)(4) of the Revenue Act of 1942 defines excessive profits as follows:

"The term 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

Clearly the foregoing is neither a definition of the term "excessive profits" nor a standard or guide whereby the executive officer can determine what are and what are not excessive profits.

“To define is to limit, and that which is left unlimited and is to be determined only by such future action as the city may hereafter decide upon, is not defined.”

Cincinnati v. Veeder, 281 U. S. 439, 448, 74 L. ed. 950, 955.

The purported definition of the term leaves it unlimited and defers the meaning of the term to some future action of a departmental secretary, at which time he may so limit and define it as to give it a hundred different meanings in as many different renegotiation proceedings.

Nowhere else in the Act is there any attempt to define what is meant by the term “excessive profits”. Nowhere in the Act is there even an attempt to lay down any standard whereby the executive officer is to be guided in determining what are or what are not excessive profits. That these matters are left to his unlimited and uncontrolled discretion is made manifest by other portions of the Act.

Section 403(c)(1) reads:

“Whenever, *in the opinion of the Secretary* of a Department, the profits realized or likely to be realized from any contract * * * may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price.”

Section 403(c)(2) provides:

“Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract * * *.”

There is no provision of law that can be referred to wherein will be found any formula which could be construed as making definite such an indefinite phrase as "Excessive profits". Individuals and even courts will be found at great extremes when called upon to determine whether, under particular facts and circumstances, the return on investment, labor, materials, initiative and ability, is reasonable or excessive.

The courts, when called upon to interpret the word "excessive" have been unable to do so in a manner which would provide a standard to be applied under any and all conditions.

"EXCESSIVE. A general term for what goes beyond just measure or amount, defined as meaning characterized by, or exhibiting excess; greater than the usual amount or degree; exceeding what is usual or proper; overmuch; the quality or state of exceeding the proper or reasonable limit or measure; tending to, or marked by, excess; unreasonably great, and clearly disproportionate."

32 *C. J. S.* p. 1154.

Congress in the Act *has not stated* what is a just measure of return, or what is the usual amount or degree of non-excessive profits, or what is the proper or reasonable limit or measure of return. These are matters left to the arbitrary determination of the executive officer. An arbitrary determination which is final and conclusive and not subject to judicial review.

The Supreme Court has heretofore passed upon and condemned legislation that cannot be distinguished

from the Act in question. The *Lever Act* (sec. 4) provided that it should be

“unlawful for any person wilfully * * * to make any *unjust or unreasonable* * * * *charge* in * * * dealing in or with any necessities,” or to agree with another “to exact *excessive prices* for any necessities.”

The terms “unjust charge”, “unreasonable charge” and “excessive prices”, cannot be distinguished from the term “excessive profits”. Any one of these terms is as vague and indefinite as the others.

The court was called upon to pass on the validity of the Act in each of the following cases:

United States v. L. Cohen Grocery Co., 255 U. S. 81, 65 L. ed. 616;

Weeds v. United States, 255 U. S. 109, 65 L. ed. 537;

Small Co. v. American Sugar Co., 267 U. S. 233, 69 L. ed. 589.

In each case the Lever Act was held to be unconstitutional as being too vague and indefinite to comply with the due process of law provision of the Fifth Amendment.

In *Small Co. v. American Sugar Co.*, supra, the court's decision reads (267 U. S. at 238, 69 L. ed. at 593):

“In a series of cases * * * this court held that provision invalid as contravening the due process of law clause of the 5th Amendment, among others, because it required that the transactions named should conform to a rule or standard which was

so vague and indefinite that no one could know what it was. By copious references to judicial pronouncements and proceedings the court illustrated that the terms 'unjust', 'unreasonable' and 'excessive' as applied to prices by that provision had no commonly recognized or accepted meaning."

As the term "excessive prices" is "so vague and indefinite that no one could know what it was", then, perforce, the term "excessive profits" is "so vague and indefinite that no one could know what it was". As the Lever Act was unconstitutional because of the vagueness and indefiniteness of the term "excessive prices", so is the Renegotiation Act unconstitutional because of the vagueness and indefiniteness of the term "excessive profits". Just as the Lever Act was void because it contained no prescribed standard for determining what constituted "excessive prices", so is the Renegotiation Act void for containing no definition or standard by which to determine what constitutes "excessive profits".

Following the foregoing quoted language from the *Small Co.* case, the Supreme Court quotes the following language from its decision in the case of *United States v. L. Cohen Grocery Co.*, 255 U. S. at 89:

"Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes (by court and jury after the act) to no element essentially inhering in the transaction as to which it provides. *It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and*

the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalize and punish all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

The last portion of the foregoing quotation (which we have printed in italics) is peculiarly applicable to the statute in question. As the Lever Act was unconstitutional in leaving to court and jury to determine whether any price charged was "unjust and unreasonable", so is the Renegotiation Act void as expressly and explicitly leaving to a Secretary of a Department the power of determining whether any profits are unjust and unreasonable, i.e., "excessive". Section 403(c)(1) expressly provides that such matter shall rest "in the opinion of the Secretary of a Department".

The *Small Co.* case also disposes of the contention that vague and indefinite statutes are only void when they apply to crimes. The court expressly held that the rule applied to both civil and criminal statutes in the following portion of its decision:

"The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.

It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases.”

In *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570, the Supreme Court condemned as unconstitutional the provisions of the National Industrial Recovery Act which attempted to delegate to the President the power to adopt and ratify codes of “fair competition”. One of the reasons assigned by the court, as to the unconstitutionality of the Act, was the fact that the Act did not define the words “fair competition”, the court pointing out that these words were susceptible of many different meanings and the Act left it to the arbitrary determination of the President to construe these words in any manner he saw fit.

In *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446, section 9(c) of the N.I.R.A. was declared unconstitutional for the following reasons, among others, hereafter referred to (293 U. S. at 430) :

“We think that § 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, *the Congress has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions* in which the transportation is to be allowed or prohibited.”

The foregoing should be sufficient to demonstrate that the Act is void, *first*, because it is so vague and indefinite as to be in violation of the due process clause of the Fifth Amendment—irrespective of any question of delegation of legislative power and, *secondly*, that it constitutes an unlawful delegation of legislative power because it sets up no standard to be followed by the persons to whom the power is attempted to be delegated.

So far, we have confined our criticisms to that language of the Act which uses the term "excessive profits"; but there are other portions of the Act which use terms equally as vague and indefinite and without any definition or standard being supplied whereby either meaning or limits can be ascertained.

Section 403(d) of the Act reads:

"In renegotiating a contract price of determining excessive profits for the purpose of this section, the Secretaries of the respective Departments shall not make allowances for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees *in excess of a reasonable amount*, nor shall they make allowances for any *excessive reserves* set up by the contractor or for any *costs* incurred by the contractor *which are excessive and unreasonable*."

The Act fails to state what shall constitute a reasonable salary, bonus or compensation or what is meant by "in excess of a reasonable amount". Neither does the Act prescribe what are "excessive reserves" or "excessive and unreasonable costs". All these matters are

left in the realm of conjecture and the various Secretaries are given arbitrary power to interpret these terms as each sees fit so to do. No standard, no guide is provided in the Act.

It may be well to call the court's attention to the things which the Renegotiation Act neither does nor attempts to do. The Act *does not* make unlawful or attempt to prohibit the making of any contracts between individuals—or an individual and the Government—even if such contracts relate to articles to be used in the war effort; it does not prohibit or make unlawful the charging of any price the parties may agree upon in such contracts; it does not make unlawful or prohibit the receiving of any profit, whether large or small, under any such contract; it does not declare that any such contract shall be unlawful or unenforceable between the parties. The Act in all instances is retroactive in operation. It permits the Government, after private parties have contracted and performed, to step in and recover for the Government a sum of money in every instance wherein a Secretary shall be of the opinion that one party to the contract earned too much money.

7. THE ACT IS VOID AS NOT PROVIDING FOR FINDINGS OF FACT ON WHICH IS BASED THE ORDER DETERMINING EXCESS PROFITS. THE ORDER IS VOID IN NOT CONTAINING SUCH FINDINGS.

The Renegotiation Act contains no provision requiring a Secretary to make any findings of fact on which is based any order determining excess profits. The order in this case contains no data or findings disclosing the basis for a determination that \$110,000 constituted excess profits.⁵⁴

As indicative of the unfairness of such a procedure we call attention to the fact that on April 11, 1944, the Secretary of War was requested by plaintiffs, in writing, to furnish "a statement of such determination together with a statement of the facts used as a basis therefor." A written reply was received stating that it was against the policy adopted to disclose such data, facts or findings.⁵⁵

It is of further interest to note that the letter refusing to disclose such data bases the denial of such information on the ground that the Revenue Act of 1943 (which does provide for findings) is not retroactive and does not apply to determinations made prior to the effective date of that Act.

In *Panama Refining Co. v. Ryan*, 293 U. S. 388, 433, 79 L. ed. 446, 465, it is expressly pointed out that delegated legislative authority cannot be constitutionally exercised by the person to whom delegated unless findings are made in support of any order, whether the Act does or does not provide for findings.

⁵⁴Complaint, p. 4.

⁵⁵See, affidavit of R. E. Spaulding, R. 217.

The language in the *Ryan* case is as follows:

“Referring to the ruling in the Wichita R. & Light Co. case, the Court said in *Mahler v. Eby*, 264 U. S. 32, 44, 68 L. ed. 549, 556, 44 S. Ct. 283: ‘We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government.’ We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation.”

In the case of *Mahler v. Eby*, quoted from in part in the last quoted decision, a more full quotation of the language used therein is as follows:

“In *Wichita R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 67 L. ed. 124, 43 Sup. Ct. Rep. 51, a statute of a state required that a public utility commission should find existing rates to be unreasonable before reducing them, but *there was no specific requirement that the order should contain the finding*. We held that the order in that case made after a hearing, and ordering a reduction, was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute, but also on general principles of constitutional government.”

Here we have not only an absence of findings on which the unilateral order was based, but *we have an*

announced policy by the officials to whom the power of renegotiation is delegated by the Act never to make findings or even to supply to the person injured by the order the data and figures on which is based the final determination of excessive profits.

8. THE ACT IS INVALID AS DELEGATING PURELY JUDICIAL FUNCTIONS TO A NON-JUDICIAL BODY.

The Renegotiation Act vests in the Executive Department the power to determine what shall constitute just compensation in all cases of contracts falling within the purview of the Act.

The Act further empowers the Secretaries to take from sub-contractors their property without just compensation.

It is fundamental that the question of compensation is purely a judicial question, to be determined in a judicial tribunal.

“Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622.”

Seaboard Air Lines Co. v. United States, 261 U. S. 299, 67 L. ed. 664, 669.

“The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the

compensation shall be, or to prescribe any binding rule in that regard."

United States v. New River Collieries Co., 262 U. S. 341, 344, 67 L. ed. 1014, 1017.

Taking the earnings, fixed by contract, from an individual and covering such sums into the federal treasury is the taking of property. To deprive a contracting party of his rights under a contract is likewise the taking of property.

"The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."

Lynch v. United States, 292 U. S. 571, 579, 78 L. ed. 1434, 1440. .

As the Act only relates to war contracts, i.e., contracts for the furnishing to the United States of articles of war, the matters produced as the result of such contracts are property taken by the United States. For such property there must be just compensation and the stipulated compensation in the contracts cannot be altered by any department of Government or a proper amount fixed except by a judicial body.

The attempt of the Act to vest the final determination of the question of compensation in the Secretaries of Executive Departments is an attempt to divert from the judiciary to the executive branch of the Government those matters falling exclusively within the jurisdiction of the courts. Such action is contrary

to the Constitution which vests the judicial power in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish. (Constitution, Art. III, sec. 1.)

“The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause * * * when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount.”

Baltimore & Ohio R.R. Co. v. United States,
298 U. S. 349, 368, 80 L. ed. 1209, 1224,

and later on the same page of the foregoing case it is stated:

“But, when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based on it.”

The determination of a Secretary is not designated as an interlocutory order, subject to review in the courts. Under the Act there is no provision for notice and hearing, no findings are required and resort to the courts is prohibited. Clearly this violates every concept of due process.

9. THE ACT IS VOID AS PRECLUDING A RESORT TO THE COURTS FOR A JUDICIAL REVIEW OF THE ORDER.

The Renegotiation Act, as it operated on February 2, 1944, expressly made the action of the Secretary final and not subject to review in any of our duly constituted judicial tribunals. (Sec. 403(c)(4).)

Any statute that by its terms or intendment precludes recourse to the courts is in violation of the 5th Amendment.

“If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago, M. & St. P. R. Co. v. Minnesota*, supra. A law which indirectly accomplishes a like result by imposing such conditions upon the right of appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.”

Ex parte Young, 209 U. S. 123, 147, 52 L. ed. 714, 724.

It may be argued that as the Revenue Act of 1943—passed after the order involved herein—provides for a hearing *de novo* in the Tax Court, that such provi-

sion cures the deficiency in the Act as it existed up to that time. However, the provision in the Revenue Act of 1943 is subject to the foregoing invalidity. The Act makes the decision of the Tax Court final. The Tax Court is not a judicial body, neither is it an arm of the judicial branch of our Government. The Tax Court is an independent agency in the Executive branch of the Government (26 U. S. C. A. 1100). In hearing Renegotiation matters the Tax Court is not required to file findings. No standards are fixed in the Act to guide the Tax Court in its determination. Whether the adjudication is made by a Secretary or by the Tax Court, recourse to the judicial tribunals is prohibited by the Act.

**10. THE ORDER DETERMINING EXCESSIVE PROFITS IS VOID
AS BEING BASED ON SECRET DATA.**

As showing the particular viciousness and lack of constitutional procedure adopted by the Secretary, together with lack of general or special findings, we again call attention to the unilateral order determining excessive profits involved herein. This order provides that "the Under Secretary of War considered certain financial, operating and other data, submitted by the contractor *or obtained by the Under Secretary of War from governmental or other reliable sources.*"

Not only must an order made under delegated legislative authority contain findings, but such order must be based upon competent evidence properly received and under such circumstances as will advise

the injured party of the nature of such material in order that he can refute or introduce evidence contrary thereto. Such findings and required evidence are also necessary in order that a court may be apprised of the evidence on which the official acted in order to determine the reasonableness and validity of the ultimate order.

In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292, 81 L. ed. 1093, the Commission made an order, as stated in the opinion of the court, "upon the strength of information secretly collected and never yet disclosed." The company there involved asked disclosure of this secret evidence just as plaintiff herein demanded such facts of the Secretary of War. There was a refusal of disclosure in both cases. The court condemned this procedure in the following language:

"From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof there is at least an opportunity in connection with a judicial review of the decision to challenge the deduction made from them. The opportunity is excluded here. The Commission,

withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

As the order purporting to determine excessive profits is void on its face, in expressly disclosing a violation of the due process clause, any order purporting to withhold money based thereon is likewise void and can constitute no justification for defendant refusing to pay the amount due to plaintiffs.

11. THE RENEGOTIATION ACT IS VOID AS CONTAINING NO PROVISION FOR NOTICE AND HEARING.

By the complaint filed herein plaintiffs directly raised the question that the Renegotiation Act violates the due process of law clause of the Constitution in that "it contains no provisions for giving to the person whose contract is sought to be renegotiated a hearing or notice of place and time of hearing of such renegotiation."⁵⁶ The Act specifically provides that there shall be no review in the courts.

Where a statute deals with the rights of person or property such statute must contain provision for notice of time and place of hearing and afford the party

⁵⁶Complaint, paragraph V(f)(12).

an opportunity to present evidence and to be heard. Lack of such provision renders the statute void.

It is not sufficient that the party may be given such notice or opportunity as a mere matter of grace. Neither is it material that the persons administering the statute attempt to comply with due process by giving notice and an opportunity to be heard.

“Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: ‘It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.’ The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust & S. B. Co. v. Lexington, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: ‘If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute’ (citing the New

York case). So, in *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 138, 52 L. ed. 134, 141, 28 Sup. Ct. Rep. 47, the court said: 'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' "

Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1027, 1032.

Immediately preceding the foregoing language the Supreme Court disposes of the contention that if statutory notice and hearing had been provided for the same results would have been brought about. Its language is as follows:

"To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

12. THE ACT IS VOID AS AUTHORIZING THE ABROGATION OF CONTRACTS BETWEEN PRIVATE INDIVIDUALS.

We are not here concerned with the right of the Government to abrogate contracts to which it is a specific party. The question now presented is whether the United States can, by the arbitrary action of an executive or administrative officer, interfere with, impair the obligation of and actually abrogate contracts freely and voluntarily entered into between individuals and in accord with the law. That Congress has no such power brooks of no argument.

We concede that private contracts must be entered into with an understanding on the part of the parties that they cannot limit or foreclose the Government from pursuing any necessary governmental function, including the right to pass general laws. This, however, is something entirely distinct from the right of Congress, by special legislation, to change agreed compensation provided for in private contracts.

(In passing we point out that even if it be assumed, for purposes of argument, that Congress had this power it has failed to exercise it in a manner consistent with constitutional requirements.)

In the case of *Lynch v. United States*, 292 U. S. 571, 78 L. ed. 1434, the court points out that contracts are property and that when the Federal Government enacted the War Risk Insurance Act it created a vested right in those availing themselves of its provisions which Congress could not take away without making just compensation. The court thus points out the limitations imposed on Congress by the Fifth Amendment relating to contracts between individuals as follows:

“Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns.”

It will be seen that the foregoing language is peculiarly applicable to contracts entered into between private contractors and sub-contractors, as distin-

guished from contracts entered into between contractors and the United States.

The Renegotiation Act is a law acting directly and independently to the end of abrogating contracts between private citizens. That Congress has no such power is stated in the case of *Continental, etc., Co. v. C.R.I. & P. R. Co.*, 294 U. S. 648, 680, 79 L. ed. 1110, 1130, as follows:

“The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states. But as far back as *Calder v. Bull*, 3 Dall. 386, 388, 1 L. ed. 648, 649, it was said that among other acts which Congress could not pass without exceeding its authority was ‘a law that destroys or impairs the lawful private contracts of citizens.’ The broad reach of the statement has been restricted (*Legal Tender Cases*, 12 Wall. 457, 549, 550, 20 L. ed. 287, 311, 312); but the principle which it includes has never been repudiated, although the extent to which it may be carried has not been definitely fixed. Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts.”

If the obligation of a contract is impaired, within the meaning of the Constitution, when the right to enforce by legal process is taken away or materially

lessened, then, manifestly, when the very obligation assumed by one of the contracting parties is directly and arbitrarily changed, the right to enforce the contract by legal process is destroyed. In other words, when private parties agree upon a contract price the arbitrary action of the Government in reducing or raising that price, which action is made binding, final and conclusive by an Act of Congress, deprives the parties of the power to judicially enforce their contracts as written.

In the *Lynch* case, the court stated:

“Punctilious fulfilment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. *But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.*”

As the Government has no power to abrogate its own contracts for the purpose of lessening expenditures or in order to permit of economy, it has no power to abrogate the contracts of private individuals for any like reasons. (See, also, *Perry v. United States*, 294 U. S. 330, 79 L. ed. 912.)

13. THE RENEGOTIATION ACT IS VOID AS AUTHORIZING GOVERNMENT INTERFERENCE WITH CONTRACTS TO WHICH THE UNITED STATES IS NOT IN PRIVITY.

It stands admitted in this case that the contracts involved during the fiscal year ending December 31, 1942, are contracts entered into between plaintiffs and third parties and not between plaintiffs and the United States or any Department thereof.⁵⁷

In *United States v. Driscoll*, 6 Otto 421, 24 L. ed. 847, a contractor with the United States employed a laborer to work on the contract and was to pay such laborer. The laborer sued the United States in the Court of Claims for extra compensation. The evidence showed that the contractor received the money from the United States to pay the laborers together with fifteen per cent added. The Supreme Court held that the laborer had no cause of action against the United States, stating as follows:

“It is clear that there was no privity between the appellee and the United States. Ordway employed him and was to pay him, and did pay him. The United States had no interest in the rate or amount paid, save that the sum so paid, with fifteen per centum in addition, was the measure of the amount to be paid to Ordway. The fact that Ordway procured the appellee’s receipts, presented his own vouchers to the Government, and received his pay before paying his hands, is immaterial as regards the rights of the parties. It was a convenience to the contractor, and safe for Government. The hands trusted the former; and, if he had failed to pay them, the loss would

⁵⁷Finding of Fact No. 6, R. 239.

have been theirs. The Government having the contractor's receipts, it could not have fallen upon the United States."

See, also,

National Surety Co. v. Washington Iron Works,
243 Fed. 260.

The contracts for war materials were entered into between the United States and various contractors. It is to these contractors the United States had to look for the fulfillment of its contracts. The contractors in turn entered into contractual relations with sub-contractors and as between these parties the Government had no interest. If the prime contractors failed to live up to their agreements, then the Government had recourse directly against them. If the Government failed to live up to its agreement the prime contractors in turn could seek redress against the United States (see, *United States v. Bethlehem Corp.* 315 U. S. 289, 86 L. ed. 855). On the other hand if the contractor failed to pay the sub-contractor or breached his contract, the sub-contractor could only seek redress against the prime contractor. He could not proceed against the United States.

No privity of contract existed between the United States and sub-contractors. The United States was without power to interfere with the contracts entered into between the prime contractor and the sub-contractor. Being without such power the Congress is without power to so interfere or to delegate to any other branch of the Government the power of so interfering.

CONCLUSION.

The case was presented to the lower court upon a theory mutually adopted and agreed upon by plaintiffs, defendant and the United States, viz.: that the only question involved was the constitutionality of the Act (R. 239). The lower court refused to decide the case upon such theory and sought for a way to avoid passing on the constitutionality of the Act. Every reason and conclusion set forth by the lower court as a justification for not passing on the constitutionality of the Act was erroneous. As the Act is unconstitutional judgment should have gone for plaintiff.

The judgment of the lower court should be reversed with directions for the lower court to order judgment for plaintiffs in the stipulated amount.

Dated, San Francisco,

November 14, 1945.

Respectfully submitted,

LEO R. FRIEDMAN,

JOS. I. McMULLEN,

Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

REVENUE ACT OF 1942. THE ACT OF OCTOBER 21, 1942 (PUBLIC LAW 753, 77TH CONGRESS, 2D SESS.), 56 STAT. 798, 982.

TITLE VIII—RENEGOTIATION OF WAR CONTRACTS

SEC. 801. RENEGOTIATION OF WAR CONTRACTS.

(a) Subsections (a), (b), and (c) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

SEC. 403. (a) For the purposes of this section—

(1) The term “Department” means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively.

(2) In the case of the Maritime Commission, the term “Secretary” means the Chairman of such Commission.

(3) The terms “renegotiate” and “renegotiation” include the refixing by the Secretary of the Department of the contract price.

(4) The term “excessive profits” means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term “subcontract” means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term “article” includes any material, part, assembly, machinery, equipment, or other personal property.

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of \$100,000 hereafter made by such Department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract for an amount in excess of \$100,000 made by him under such contract (i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct, and (iii) a provision for relieving the con-

tractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and (iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary, (i) may fix the period or periods when or within which renegotiation shall be had; and (ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such

Department, or from any subcontract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract (i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms; or (ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or (iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or (v) by any combination of these methods, as the Secretary deems desirable. The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. All money re-

covered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the contract which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code.

(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact, (i) such agreement shall not be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and (ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate or eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or

(ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403, or (iii) the aggregate sales by the contractor or subcontractor, and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, \$100,000 for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

(b) Subsection (f) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended to read as follows:

(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(c) Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended by adding at the end thereof the following subsections:

(i) (1) The provisions of this section shall not apply to—

(i) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(ii) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; and the Secretaries are authorized by joint regulation, to define, interpret, and apply this exemption.

(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body,

of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits.

The Secretary may so exempt contracts and subcontracts both individually and by general classes or types.

(j) Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person appointed by the Secretary of a Department for intermittent and temporary employment in such Department, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided*, That such person shall not prosecute any claim against the United States (1) which arises from any matter directly connected with which such person is employed, or (2) during the period such person is engaged in intermittent and temporary employment in a Department.

(d) The amendments made by this section shall be effective as of April 28, 1942.

Approved, October 21, 1942, 4:30 p. m.

No. 11134

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

R. E. SPAULDING, L. B. MANLOVE AND P. M. MANLOVE, COPART-
NERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE
OF MANLOVE & SPAULDING MFG. CO., APPELLANTS

v.

DOUGLAS AIRCRAFT COMPANY (A CORPORATION), AND UNITED
STATES OF AMERICA, APPELLEES

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

BRIEF OF APPELLEES

FILED

PAUL P. O'BRIEN,
CLERK

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 11134

**R. E. SPAULDING, L. B. MANLOVE, AND P. M. MANLOVE,
COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME
AND STYLE OF MANLOVE & SPAULDING MFG. CO.,
APPELLANTS**

v.

**DOUGLAS AIRCRAFT COMPANY (A CORPORATION), AND
UNITED STATES OF AMERICA, APPELLEES**

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR APPELLEES

(VII)

JURISDICTIONAL STATEMENT

As appellants point out, the jurisdiction of this Court is established by 28 U. S. C. 225 and jurisdiction of the District Court by 28 U. S. C. 41. Each of the appellants is alleged to be a resident of Los Angeles¹ and appellee, Douglas Aircraft Company is a Delaware Corporation.² The amount in controversy exceeds \$3,000.00, exclusive of costs and interests.³

Pursuant to a certificate from Judge Harrison,⁴ the United States of America intervened in the action under the provisions of the Act of August 24, 1937 (28 U. S. C. 401) and of Rule 24 of the Federal Rules of Civil Procedure.⁵

STATEMENT OF THE CASE

On February 2, 1944, the Under Secretary of War, acting pursuant to the Renegotiation Act, determined that during the year ending December 31, 1942, appellants had realized excessive profits on war business in the sum of \$110,000.00. A demand was made for a refund to the United States of that amount, less the appropriate tax credit.⁶ During 1942, appellants manufactured and sold mechanical fittings and parts for airplanes,⁷ and the full capacity of appellants' plant was directed to the production of materials which had a war end use.⁸ Appellants' total sales for 1942 were approximately \$405,000.00 and the profit on these sales, after payment of all expense except salaries to the partners, taxes and investments in the business, was \$211,000.00, or a ratio of profit to sales of 52%.⁹ The

¹ R. 2.

² R. 3.

³ R. 3.

⁴ R. 19.

⁵ R. 35.

⁶ R. 7.

⁷ R. 234.

⁸ R. 233.

⁹ R. 211.

Under Secretary reduced the profit to \$100,000.00, making a ratio of profit to adjusted sales (total sales reduced by \$110,000.00) of 33%. Each of the three partners, therefore, received for his year's work \$33,000.00 after renegotiation. On this \$33,300.00 each partner, like all other persons, paid taxes.

The order of the Under Secretary recites that it was made after consideration of financial, operating and other data submitted by appellants or obtained from other reliable sources, and after appellants had been granted full opportunity to submit additional information and to present such contentions as they deemed material at hearings of which due notice was given.¹⁰

On February 25, 1944, the Renegotiation Act was amended (Title VII of the Revenue Act of 1943) to provide that appellants were entitled to a redetermination *de novo* of the amount of their excessive profits by the Tax Court of the United States. Appellants did not seek that redetermination¹¹ and the period for filing a Tax Court petition has expired. Accordingly, the order of the Under Secretary has become final and is now beyond attack.

An order determining the amount of a contractor's excessive profits is not self-executing and the statute (§ 403 (c)) describes the methods by which the Government may make collection. They are: (a) by an affirmative suit, (b) by set-off, and (c) by the issuance of withholding orders, that is, orders from the Government to prime contractors instructing them to hold for the account of the United States amounts which would otherwise be payable to the contractor. Such an order was issued to Douglas¹² and pursuant to that instruction Douglas withheld for the account of the United States \$27,580.80.¹³

The Renegotiation Act became law on April 28, 1942. During the balance of the year and charged with knowledge of the statute, appellants continued to bid for and accept work and to enter into agreements subject to the Act.¹⁴ Furthermore, on November 14, 1942, appellants agreed in writing to certain so-

¹⁰ R. 7.

¹¹ R. 218.

¹² R. 9.

¹³ R. 219. *

¹⁴ R. 233.

called special conditions which provided, in effect, for renegotiation.

Under these circumstances, Judge Harrison concluded: (a) that appellants had agreed to renegotiation and that the constitutionality of the statute was therefore immaterial; (b) that appellants were estopped from challenging the constitutionality of the statute; and (c) that, in any event, since the Renegotiation Act related to the expenditure of public funds, no case or controversy justiciable by the courts was presented in this litigation. The motions of defendant Douglas and the intervenor, the United States of America, for summary judgment were granted.

ARGUMENT

Estoppel

The court below decided that the conduct of appellants has been such that they may not now contend that their excessive profits are not subject to recapture under the Renegotiation Act. That decision was not necessarily based, as appellants seem to believe, on a finding that appellants with respect to every purchase order and every dollar of excessive profits had agreed to renegotiation. It was based, as any such decision is always based, on a consideration of appellants' conduct in its entirety. That conduct, Judge Harrison concluded was, *in general*,¹⁵ so thoroughly inconsistent with appellants present position as to compel the court to refuse relief. The Renegotiation Act was passed on April 28, 1942 and appellants, charged by that statute with notice that the Government would require a refund of excessive profits on war business, nevertheless continued to bid for and accept that business. Now, having reaped from that business and at public expense not only a normal profit but a profit obviously excessive, appellants seek to repudiate the condition to which they agreed by accepting the business, that is, the refund of excessive earnings. That Judge Harrison should have found this position indefensible is scarcely surprising. Furthermore, the warning of the statute that a refund would be required was implemented by the letter

¹⁵ Emphasis supplied throughout this brief.

of September 14, 1942, from Douglas to appellants directing specific attention to the refund obligation and saying in part: ¹⁶

Section 403 requires us to insert a renegotiation clause in each subcontract involving more than \$100,000, and the provisions of some of our more recent contracts define "subcontract" as including practically everything we buy. Furthermore, we suspect that we should insert it in each purchase order, since the total orders to any firm under a given contract may aggregate more than \$100,000. Therefore, we believe that, for safety's sake, we should insert a clause in every purchase order. It is much simpler to do this by means of a blanket agreement than by attaching the clause to each order. Hence we are enclosing two copies of such a blanket agreement, with the request that you execute one and return it to us.

On November 14, 1942, appellants signed and sent to Douglas the form agreement.¹⁷

This exchange of correspondence Judge Harrison found to be a contract by appellants to refund to the United States excessive earnings in the amount determined by the Secretary of War, and in view of this contractual obligation Judge Harrison concluded that the constitutionality of the statute was immaterial. Appellants seek to escape this conclusion by pointing out that although the Renegotiation Act reaches all contractors whose aggregate sales for the fiscal year 1942 total \$100,000, the statute required that an express renegotiation clause be inserted only in subcontracts which individually are in an amount in excess of \$100,000.¹⁸ Appellants had no such

¹⁶ R. 25.

¹⁷ R. 27: "We hereby agree that Special Conditions 42 and 42A printed on the reverse side hereof shall be applicable to all purchase orders which you issue to us under Army and Navy contracts respectively; provided, however, that this agreement shall cover only purchase orders in which you are required by law or by contract to insert such Special Conditions, and shall continue only so long as such requirement may be effective."

¹⁸ The provision requiring the insertion of an express renegotiation clause in contracts in an amount in excess of \$100,000 is purely procedural and it does not define or purport to define which contracts are renegotiable. The plain words of the statute make it clear that *any* contract or subcontract on

contracts. This argument, however, completely fails to meet Judge Harrison's propositions. The decision below was obviously based not only on appellants' written agreement to accept renegotiation but also on the fact that appellants bid for and accepted renegotiable business after April 28, 1942. Furthermore, it is by no means clear that the agreement expressed in the correspondence did not bring about the inclusion of an express renegotiation clause in every purchase order, regardless of amount. That Douglas so intended is made plain by the letter of September 14, 1942:¹⁹

Therefore, we believe that, for safety's sake, we should insert a clause in every purchase order.

It was this proposition which appellants accepted on November 14. Furthermore, the proviso in the letter of November 14, stated that the special conditions were to be included in all subcontracts where those conditions were required either by law or by *contract*. What contractual obligations Douglas may

which excessive profits are realized is subject to renegotiation. Section 403 (c) says:

"* * * whenever in his opinion excessive profits have been realized, or are likely to be realized, from *any* contract with such Department or from *any* subcontract thereunder,"

This is confirmed by the provisions of § 403 (c) that the subsection "shall be applicable to *all* contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, *whether or not such contracts or subcontracts contain a renegotiation or recapture clause, * * **"

The provision limiting the requirement for express renegotiation clauses to contracts in excess of \$100,000 was obviously designed to reduce the administrative burden of inserting express clauses in the contracts.

That renegotiation of any contract is authorized, regardless of its amount, is confirmed by the legislative history of the Act. The War Department issued on August 10, 1942, a statement entitled "Principles, Policy and Procedures to be Followed in Renegotiation." That statement, on page 9, unequivocally states that renegotiation of all contracts is authorized and it was in the light of that statement that the statute was amended and reenacted on October 21, 1942. Subsection (b) of the October amendments continued to require the insertion of a renegotiation clause in each contract in excess of \$100,000. Subsection (c) authorized the renegotiation of any contract, and Subsection (c) (6) (iii) was added providing for exemption from renegotiation of any contractor whose contracts did not in the aggregate exceed \$100,000. The amendments were made effective as of April 28, 1942, the date of the original Act. The amendments of October 21, 1942, were passed, of course, long prior to the renegotiation of appellants' business.

¹⁹ R. 25.

have had to insert express renegotiation clause in purchase orders is not shown by the record, except by inference from the Douglas letter of September 14 stating that the clause was to be inserted in each order. It is submitted that on this state of the record the trial judge was entitled to conclude that the parties intended that a renegotiation clause be included in every purchase order regardless of its amount.

Nor do appellants escape the force of the decision below by pointing out that their 1942 business was not done with Douglas alone. The estoppel does not depend upon the assent of appellants to every aspect of renegotiation nor upon an express agreement by them to refund every dollar of excessive earnings. The estoppel is made out by demonstrating that considered in its entirety appellants' conduct has been such that they may not now, in justice and fairness, refuse to refund their excessive earnings. And the question for decision, therefore, is not whether appellants can demonstrate that there was no express argument on their part for renegotiation of some portion of their business; the question for decision is: May appellants who after April 28th and throughout 1942 bid for and accepted business on the understanding expressed in the statute that a refund would be made of excessive earnings and who agreed in writing to a refund of at least part of those earnings, repudiate the condition which they accepted and the agreement which they signed and demand that the Court obtain for them every cent of their excessive and unconscionable profits? To this question Judge Harrison answered "No."

The decision below finds abundant support in the precedents. It is supported, for example, by the principle that the Federal Courts will not act in aid of a manifest injustice or in a manner contrary to the public interest. *Morton Salt Co. v. Suppiger Co.*, 314 U. S. 488, 492 (1942);²⁰ *Johnson v. Yellow Cab Co.*,

²⁰ "It is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest. *Virginian Ry. Co. v. Federation*, 300 U. S. 515, 552; *Central Kentucky Co. v. Railroad Commission*, 290 U. S. 264, 270-73; *Harrisonville v. Dickey Clay Co.*, 289 U. S. 334, 337-38; *Beasley v. Texas & Pacific Ry. Co.*, 191 U. S. 492, 497; *Securities & Exchange Comm'n v. U. S. Realty Co.*, 310 U. S. 434, 455; *United States v. Morgan*, 307 U. S. 183, 194" (p. 492).

321 U. S. 383, 387 (1944). To permit appellants to retain their excessive profits after having bid for and obtained their business in the face of the statute is so manifestly unfair as to preclude a Federal Court from granting any aid to them. The relief demanded by appellants would not only be unjust but it "would make the Court the instrument of this injustice." *Thomas v. Brownville R. R. Co.*, 109 U. S. 522, 526 (1883).

Furthermore, it is well settled that constitutional rights may be waived, *Pierce Oil Co. v. Phoenix Refining Co.*, 259 U. S. 125 (1922), and an estoppel to urge constitutional rights frequently arises from conduct inconsistent with their assertion. *United Gas Co. v. R. R. Comm'n*, 278 U. S. 300 (1929); *Wall v. Parrott, Silver & Copper Co.*, 244 U. S. 407 (1916). It is well settled for example, that one who received the benefits of a statute may not challenge its constitutionality. *McKinney v. Carroll*, 12 Pet. 66, 70 (1838); *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U. S. 17, 29 (1904); *Kansas City, Memphis & Birmingham Ry. Co. v. Stiles*, 242 U. S. 111, 117 (1916); *Hurley v. Commissioner*, 257 U. S. 223 (1921); *St. Louis Co. v. Prendergast Co.*, 260 U. S. 469 472 (1923); *Buck v. Kuykendall*, 267 U. S. 307, 316 (1925); *Booth Fisheries v. Industrial Comm.*, 271 U. S. 208 (1926); *Frost v. Corporation Commission*, 278 U. S. 515, 527 (1929); and see *Shepard v. Barron*, 194 U. S. 553 (1904).

This rule might well be given full application here. The Renegotiation Act is not an isolated statute having no relation to other acts of Congress; it is an integral part of the congressional program for war and particularly a part of the war procurement program. The renegotiation provisions first appear not as an independent act but as Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942. That Act appropriated approximately \$15,000,000,000 for military purposes and it might well be that appellants received payment for their 1942 business from this very appropriation. In any event, since appellants during 1942 did war business almost exclusively, appellants certainly received the benefit of the Government war procurement program, and plainly the statutory provisions for renegotiation are part of that program. On this analysis, the cases cited are more than highly per-

suasive analogies; they are clear and controlling precedents. And even if appellants could escape these decisions they would be defeated by the general rule that one may not repudiate the burdens of a transaction after having accepted its benefits²¹—appellants having accepted renegotiable business and benefited thereby may not now repudiate the burden of refunding that portion of their profits determined to be excessive.

Judge Harrison held, as an independent ground for his decision, that the question of the constitutionality of the Renegotiation Act was not a controversy justiciable by the courts. In reaching this conclusion, he cited and relied on *Perkins v.*

²¹ The rule that one may not repudiate the obligations of a transaction from which he received the benefits is applied in a great variety of circumstances.

Young v. Clarendon Township, 132 U. S. 340, 355 (1889) : "The company knew the statute—was held by the law to know and understand it. It contracted with the township through the statute, and could so contract with it in no other way. Availing itself of the statute, it must take it *cum onere*."

Lindsay and Phelps Company v. Mullen, 176 U. S. 126, 151 (1899) : "At any rate, if this plaintiff wanted to take advantage of the conveniences furnished by the boom, it is not in a position to avoid compliance with these provisions of the statutes of the State which authorized the construction of the works."

Grand Rapids & Indiana Ry. Co. v. Osborn, 193 U. S. 17, 29 (1904) : "Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body."

American Railway Express Co. v. Lindenburg, 260 U. S. 584, 592 (1923) : "Having accepted the benefit of the lower rate dependent upon the specified valuation, the respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing."

St. Louis Co. v. Prendergast Co., 260 U. S. 469, 473 (1923) : "It is enough for our action that the court considered plaintiff estopped to contest the validity of the tax which was imposed by connecting its premises with the sewer. In that conclusion we concur."

Walker v. Gish, 260 U. S. 447, 452 (1923) : "In using it, he waived the right to object to the regulations with which he complied without objection, until he was called upon to pay his share of that which he had taken and used."

Magee v. United States, 282 U. S. 432, 434 (1931) : "The taxpayer benefited by the claim and is not in a position to contest its legality."

International Contracting Company v. Lamont, 155 U. S. 303, 310 (1894) : "A party cannot avoid the legal consequence of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences."

Maricopa & Phoenix Railroad v. Arizona, 156 U. S. 347 (1895) ; *Wilkes v. Dinsman*, 48 U. S. 88 (1849).

Lukens Steel Co., 310 U. S. 113 (1940). The Supreme Court there held that the United States, like any private person, may state the terms upon which the business for which it pays must be done and that no court is entitled to interfere with or to pass judgment upon those terms. The steel companies contended that the terms which the Secretary of Labor proposed for Government contracts were unauthorized by the Public Contracts Act. The Court of Appeals for the District of Columbia agreed and issued an injunction against the Secretary. The Supreme Court reversed, pointing out, first, that any failure of the Secretary to follow the instructions of Congress was a matter exclusively for the attention of Congress, and, second, that the Government traditionally had full power, free of judicial interference, to fix the terms upon which it would conduct its business:

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

* * * * *

This Act's purpose was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment.

* * * * *

We find nothing in the Act indicating any intention to abandon a principle acted upon since the Nation's founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases (pp. 127-128).

If by the Public Contracts Act the Government can state, free from judicial restraint, the conditions upon which it will make purchases, it is difficult to believe that the Government may not by the Renegotiation Act state the condition, that is,

refund of excessive earnings, upon which war business may be done. A contractor engaging in war business took that business with the burden and the duty of making the refund demanded by the law. No court can be asked to tolerate the contention that a contractor, who accepted the obligations of the statute by accepting war business and who realized excessive earnings, can now defend his excessive profits by urging the invalidity of the Act.²²

The circumstances of this case are, it is submitted, more than sufficient to justify the decision below granting appellees' motion for summary judgment. If, however, this Court were to conclude that Judge Harrison was wrong in deciding that appellants have no standing to challenge the Renegotiation Act, the decision below is nevertheless correct for the reason that the Renegotiation Act is in all its aspects constitutional.

The Renegotiation Act

The importance of the Renegotiation Act to the nation's taxpayers cannot be overstated. Pursuant to this statute, refunds to the United States of excessive war profits have been made in an amount, prior to tax credit, of more than \$6,000,000,000.²³ Renegotiation, furthermore, served as an integral feature of the program which brought success in the war. Appellants now propose that this program be repudiated by the courts and that the claim of profiteers for excessive and sometimes scandalous war profits be allowed against the taxpayers.

War brought to the United States the problem of mobilizing every resource of the nation toward a single objective, the unconditional surrender of Germany, Italy, and Japan. Success in attaining that objective depended on success on many fronts: on success in the acquisition and allocation of mate-

²² On this record it is clearly permissible to conclude that no contract of appellants made subject by the Under-Secretary to renegotiation was executed prior to April 28, 1942. The allegation of the complaint (R. 6) that all of appellants' 1942 business was the subject of the order of the Under Secretary was denied (R. 23, 44). No finding was made and no evidence was presented as to the date of appellants' subcontracts. Compare the assertion of appellants' brief, p. 22:

"Besides, there is no proof that defendant placed any orders with plaintiffs between November 14, 1942 and January 1, 1943."

²³ Hearings, Committee on Ways and Means, House of Representatives, 79th Cong., 1st Sess., on H. R. 2628; Statement of Hon. Robert P. Patterson, Under Secretary of War, p. 15.

rials, in the distribution and skill of the labor force, in the control of prices, in arranging Government finance, in maintaining morale, in avoiding inflation, in developing new weapons of war, in mass production of supplies and equipment and, ultimately, in the size and power of the fighting forces. There was on December 7, 1941, no single plan ready at hand by which all this could be achieved and no single plan was ever developed. There was, instead, a series of plans and a series of policies knit together to make an operating program sufficiently integrated and at the same time sufficiently flexible to permit the nation to achieve victory.

The outline of this program can be found in the acts of Congress. The Selective Service Act provided the mechanics for obtaining men. It also placed authority in the procuring agencies to issue mandatory production orders and, as a last resort, the President was authorized to take over and operate production facilities. The Revenue Act provided funds for maintaining the military establishments and by taxation helped to absorb consumer purchasing power which might otherwise have disrupted the economy. Rationing and priority orders issued pursuant to the Second War Powers Act regulated the flow and controlled the use of critical materials. The Emergency Price Control Act steadied the business structure of the nation by price regulation. The War Labor Board adjusted labor disputes and maintained appropriate wage levels. Appropriation bills allocated funds for the purchase of weapons and supplies. And the Renegotiation Act operated to maintain morale, reduce the tax burden, stimulate efficient production and eliminate war profiteering with its attendant evils. It is within the framework thus provided by acts of government that the war was fought.

The attacks upon that framework have been notably unsuccessful. Congress resisted every attempt to repeal or emasculate war legislation, and indeed the tendency was to strengthen that legislation at every sign of weakness. Attacks through the courts have been equally unavailing. The authority to control prices, the authority to allocate materials, the authority to take over war production facilities, the authority to draft men are now sustained beyond possibility of doubt. Here the ques-

tion is the authority to renegotiate war contracts and to recapture excessive war profits. It is submitted, and the Government believes the Court will conclude, that the war power of the Federal Government, including as it does power over facilities, materials and men, is sufficiently broad to place power over profits beyond question. The Constitution has not heretofore been read to defeat the national program for war. It should not be so read in this case.

The reasons assigned by appellants for the conclusion that the Renegotiation Act is unconstitutional are not impressive. It is argued that the statute unlawfully delegates legislative power to executive officials—but the statute provides standards more than adequate under the Constitution and, in any event, the very detailed standards adopted by the administrative officials have been ratified and adopted by Congress. It is argued that renegotiation takes appellants' property without "just compensation" and that there is an unlawful failure to provide for a court determination of the amount of such "just compensation"—but renegotiation is not an exercise of the power of eminent domain; it is an exercise of the regulatory power of Congress to control war profiteering, and appellants' property, voluntarily delivered to Government contractors, has not been "taken" by the Government or by any one else. It is argued that renegotiation impairs the obligation of contracts—but renegotiation in operation does not modify contract prices; it only recaptures by administrative action excessive profits on total war business. It is argued that the statute is void because it does not require administrative findings and that the order is void for the lack of adequate findings—but no court has ever held that a statute must require administrative findings and this Court has expressly ruled that the absence of findings does not affect the validity of an administrative order. It is argued that the order was unlawfully based on secret data and that the statute is unlawful because it contains no express provision for notice and hearing—but appellants, having failed to avail themselves of the opportunity for *de novo* hearing and redetermination in the Tax Court, are in no position to complain even though their contentions were

otherwise valid, which they are not. And finally, it is argued that the Act unlawfully abrogates contracts between private individuals—but there has, as a matter of actual fact, been no interference with or modification of appellants' contracts and, in any event, the power of Congress to modify such contracts in the public interest is beyond dispute.

THE STATUTE

The determination of excessive profits before the Court is a determination of excessive war profits realized during the calendar year 1942. The statute which authorizes this determination is the Sixth Supplemental Appropriation Act, 1942, which became law April 28, 1942, as amended by the Revenue Act of 1942, which became law October 21, 1942.

Section 403 (a) of the Sixth Supplemental National Defense Appropriation Act, 1942, defines department to mean the War Department, the Navy Department, the Treasury Department, and the Maritime Commission.

Section 403 (b) directs the Secretaries of the departments to insert in department contracts provision for renegotiation of the contract price, provision for retention by the United States of excessive profits or repayment of such profits to the United States, and a provision requiring prime contractors to insert similar clauses in subcontracts.

Section 403 (c) directs the Secretaries to require renegotiation of contract prices; directs elimination of excessive profits realized under such contracts either by reductions in the contract price, or by withholding payments otherwise due the contractor, or by directions to prime contractors to withhold for the United States sums otherwise due a subcontractor, or by court actions brought on behalf of the United States; provides for tax credits; authorizes final agreements between the Government and the contractor; provides periods of limitation; and provides that the section shall be applicable to all contracts and subcontracts, regardless of the presence or absence of a renegotiation clause, except those as to which final payment had been made prior to April 28, 1942, or which are specifically made exempt.

Section 403 (d) directs the Secretaries to disallow unreasonable salaries and unreasonable reserves in determining excessive profits and permits the use of the subpoena power provided by Title XIII of the Second War Powers Act.

Section 403 (e) authorizes demands for additional information; section 403 (f) provides for delegations of authority; section 403 (g) is a separability clause; and section 403 (h) provides for expiration of the statute.

Section 403 (i) exempts contracts between governments and their agencies and contracts for the products of mines, oil wells and timber tracts; and authorizes exemption, if the Secretaries see fit, of contracts to be performed outside the United States, contracts under which profits can be determined with reasonable certainty when the contract price is established, and portions of contracts if the provisions of the contract are otherwise adequate to prevent excessive profits.

Section 403 (j) is a technical provision relating to Government personnel.

The statute is so phrased that only war contracts and the profits realized from war business are affected by its provisions; the ordinary commercial agreements of the contractor and the profits from such agreements remain undisturbed by renegotiation.

On February 25, 1944, the Renegotiation Act was amended and reenacted by Titles VII and VIII of the Revenue Act of 1943. Section 403 (e) (2) of the amended statute specifically provided that contractors such as appellants should be entitled to de novo redetermination in the Tax Court of the amount, if any, of their excessive profits.

The text of original statute and all amendments are furnished to the Court with this brief.

A

The procurement problem and the necessity for renegotiation

The attack on Pearl Harbor brought to the United States a procurement problem of gigantic proportions. In the months following December 7, 1941, the industrial capacity of the nation was converted to the production of war materials and to meet war objectives. Speed was the first consideration. Too

little and too late had lost France and half of Russia, forced England to a last ditch stand and permitted Japan to take an empire reaching from the Aleutians to Singapore and Sumatra. It was only too plain that the failure of the United States to arm for war more rapidly than any nation had ever armed for war was likely to be the last and fatal mistake.

1. The volume of contracts

The public will to provide what the nation required was beyond question, but United States industry is geared to produce for profit and in response to a commitment to pay in dollars for the goods produced. This meant that for every piece of equipment, for every gun or ship or tank, for every item of supply right down to the last boot lace in the last boot, there had to be at least the form of an agreement whereby the purchaser, ultimately the United States, undertook to pay for what was produced. Procurement therefore could proceed no faster than contracting. In January 1942 contracts let for war purposes totalled in dollar volume over \$9,000,000,000 and during the four months of July through October, the War Department alone executed over 1,400,000 contracts. The Navy during the last six months of 1941 committed by contract \$6,000,000,000 and actually expended about \$2,800,000,000. For the first six months of 1942 the figures jumped to \$17,200,000,000 in commitments and \$6,200,000,000 in actual expenditures. So rapid was the rate of contracting that on June 30, 1942, the outstanding obligations of the United States for war purposes amounted to nearly \$43,000,000,000. The total expenditures of the War and Navy Departments for the fiscal year ending on that date, amounting to nearly \$23,000,000,000, exceeded the total military and naval expenses of the United States from 1789 through the end of the World War.²⁴

2. Modification of traditional procurement procedure

There was, of course, neither in the War or Navy Departments nor anywhere else a mechanism for handling this volume of contracts with any degree of care or precision. Purchasing

²⁴ Patterson affidavit, par. 12 (R. 57); Hensel affidavit, pars. 9-12 (R. 134-140).

which during peacetime was scattered through thousands of customers was suddenly centered in the United States. The result inevitably was confusion—confusion, however, from which order had to be established in the shortest time possible.

The traditional method of purchase by the United States is based on competitive bidding. Detailed specifications are drawn up, circulated through the trade and advertised. Bids are submitted and on a named date the bids are opened. The award is made and the low bidder is so advised. The contract is drawn, a performance bond is posted, and production then begins. This procedure, admirably adapted although it may be to protect the public interest in the purchase of office supplies or in constructing a post office, was completely useless as a method of directing the entire national production to war objectives. By the First War Powers Act of December 18, 1941, Congress confirmed and greatly extended the practice, begun in 1940, of direct negotiation between the Government and the supplier. In March 1942 this method was established as the method to be followed by procurement officials in the absence of express instructions to the contrary and broad authority was given to field offices to conclude final agreements.²⁵ But even direct negotiation was not fast enough to meet the demands of the early war period. A procurement contract, like any contract, requires agreement on all its terms and the war would not wait while that agreement was obtained. The Services devised, therefore, methods for obtaining production while negotiations were still in process. These methods included the letter of intent and to some degree the letter contract and letter purchase order.²⁶ The letter of intent is no more than advice to the contractor that it is contemplated that an order will be placed with him at terms to be agreed upon and requesting that he begin immediately with such plant conversion, retooling, etc. as may be necessary. It is agreed that he will be protected against loss if no final arrangement is made. The letter contract and letter purchase order are slightly more formal but at best these devices, and particularly

²⁵ Patterson affidavit, par. 17 (R. 67).

²⁶ Patterson affidavit, par. 18 (R. 68) ; Hensel affidavit, par. 12 (R. 139).

the letter of intent, are only stop-gap expedients designed to advance, to the extent possible, the all important delivery date. Ultimately, however, the contracting officer and the supplier must negotiate a complete contract and all too frequently there was in the last analysis not even the most tenuous basis for that negotiation.

3. The difficulties of procurement contracting ²⁷

(a) *New weapons and supplies.*—The War in Europe demonstrated the striking power of a mechanized force. The war in Asia obviously required amphibious operations. The development of air power demanded wholesale revision in traditional combat techniques. This meant that many weapons and supplies, never before produced except as laboratory models had to go immediately into mass production. Radar equipment and Bofors and Oerlickon guns are three examples among many. For such articles, neither the contracting officer, nor any contractor or supplier had either production or cost experience. The future would disclose the problems, and, it was hoped, provide the solutions.

(b) *Modifications of specifications and design.*—The situation with respect to weapons which had been produced in substantial quantities prior to 1941 was scarcely less difficult. The rapid development of combat technique and the rigid test of performance under fire produced a never ceasing flow of change orders and modifications in design. It was pointed out to the House Naval Affairs Committee, for example, that during the construction of a single destroyer, 2,000 change orders had been issued.²⁸ Cruisers were changed to carriers midway in construction. The armament and design of battleships, after the loss of the *Repulse* and the *Prince of Wales*, were radically altered to withstand air attack. Techniques were worked out for increasing fire power, and gun specifications were modified accordingly. Increased fire power, in turn, required heavier and more resistant armament. The course of war and victory

²⁷ Patterson affidavit, pars. 14-16 (R. 59-66) ; Hensel affidavit, pars. 15-68 (R. 142-171).

²⁸ "Legislative History of the Renegotiation Act," par. IV (2), p. 53.

itself demanded that existing procedures be constantly modified. Each campaign was in large measure a separate procurement problem. What was intended for North Africa had to be radically altered if it was to be used in the Solomons.

(c) *Increased volume.*—The volume of production demanded of American industry and of each supplier was totally unlike anything within experience. What this might mean in terms of cost and price could only be a matter of speculation. Production lines built for mass output frequently work cost miracles—but not always. And no supplier could fairly have been asked to accept in his 1942 contract a price based on a cost figures as low as might be hoped for when optimum volume was achieved. This was particularly true because of the unresolved and crucial problems of labor and material supply.

(d) *Labor problems.*—In the early months of 1942 it was apparent that the United States was about to take from the very center of the nation's labor force an army of unprecedented size. That this would disrupt the supply of trained labor was clear enough but what the exact consequence would be for any individual plant or for any individual operation was beyond prediction. No one could say how soon, how successfully, or from where a substitute labor force could be obtained and even when the men were found there would remain in almost all cases the problem of training them to work together efficiently. In many instances that training had to be in terms of techniques for the production of new weapons, techniques more or less unknown to management and labor alike. What wage levels would be maintained was equally difficult to estimate. War always means inflation, the extent of which appears to depend almost entirely on the efficacy of control. The degree of success that would be achieved in the control of inflation was unknown.

(e) *Material costs and supply.*—The uncertainties which confronted the contractor with respect to materials were, if possible, even greater than those he faced in connection with labor. One thing, however, was obvious—the supply of strategic materials was not sufficient to satisfy all purposes. A priority plan would have to be devised, but how quickly it would appear, how well it would work, who would receive what and in what

amounts, no one knew or could know. Every plan for a production line was made conditional and to some degree speculative by the fact that the essential materials might not be available and, if once available, might at any time be diverted to a more urgent need. It was plain, too, that for some critical items wholesale substitution would have to be made and that for others, even for commodities as basic as steel, substitutes would have to be used wherever possible. What the substitutes might be and what they might cost remained to be seen.

To these major difficulties was added a host of minor problems such as the availability of adequate financing, the availability of tools and production equipment, the cost of conversion, the disruption of transportation and many other factors which for each particular contractor were of greater or lesser significance.

All these risk factors were legitimate problems on which the Government and the supplier had to reach agreement. The result in most cases was a fluid contract which in the last analysis did little more than commit the contractor to use his best efforts to produce and the Government to pay for the production.²⁹ To protect the public against the more obvious hazards, such as that of purchasing useless products, provision was made, first, that specifications could be changed at the will of the Government, and, second, that if the Government so desired the contract could at any time be entirely terminated. Various termination clauses were developed in an attempt to protect contractors against loss in the event of cancellation or cutbacks of orders. Provision was also made for Government inspection of the supplies and to a limited extent there was a guarantee by the contractor of quality.

On the contractor's side a variety of clauses were included to assist production and to minimize risk of loss. Liberal provision was made against damage claims for unavoidable delays. Advance payments under the contract were frequently authorized and partial payments were made as goods were delivered. The contractor was often empowered to purchase at Government expense necessary tools and machines and make other

²⁹ Patterson affidavit, par. 19 (R. 72); Hensel affidavit, pars. 102-122 (R. 198-208).

plant installations. As protection against drastic increases in labor and material costs, escalator clauses were included. These clauses provided for automatic increases in the contract price to keep pace with advances in a designated index of national wage rates or material prices. This was at best an unsatisfactory arrangement for the obvious reason that the cost of the particular item might rise much more rapidly or much more slowly than any statistical index.

4. The impossibility of accurate pricing; the policy of pricing on top of the contingencies; the accumulation of excessive profits³⁰

Of all the problems of procurement contracting, the price problem was by all odds the most difficult. Every uncertainty, every change of circumstance, necessarily affected the figure that constituted a fair price. A change in specifications demanded another price. Increased labor costs fairly required new prices. Production lines stopped because of material or labor shortages; again a price adjustment was in order. On the other hand, the successful training of labor, the establishment of satisfactory supply lines, the development of new and more efficient manufacturing techniques, the achievement of mass production, the solution of conversion problems—all these countervailing factors could also fairly be said to require price adjustment. Under the circumstances prevailing in a war economy neither the importance nor the effect on price of a single one of these items could be accurately predicted and certainly no prediction at all could be made as to the net price result of these various and conflicting forces.

This price problem was never entirely solved, but a procedure was early adopted to meet it. Two things were done: first, price was made a consideration secondary to the production of weapons and supplies in the time and in the quantities needed for military purposes, and, second, a price policy was adopted which permitted the contractor to bid on top of the contingencies, that is, to place his price at a point which would provide protection for him against current and foreseeable hazards to production. It was recognized, of

³⁰ Patterson affidavit, pars. 14-18 (R. 59-68); Hensel affidavit, pars. 15-68 (R. 142-171).

course, that with respect to any given contractor not all of the anticipated difficulties, and indeed perhaps none of them, would ever materialize. This policy meant inevitably the realization in many instances of excessive and sometimes scandalous profits, and producers and purchasers alike recognized that good faith dealing would require a price adjustment in the light of actual production experience. Renegotiation is the contemplated price adjustment.

The effect of this price policy, adopted to speed deliveries and meet in time the demands of the Services for weapons and supplies, is illustrated by the experience of various purchasing bureaus of the Navy Department.³¹ The total contract price on a group of thirteen contracts executed during 1940 and 1941 by the Bureau of Ships was approximately \$750,000,000; total actual cost was about \$515,000,000 and the profit, absent renegotiation, would therefore have been 45.7% of cost. This is without regard to the provision for escalation which, had it been given effect, would have added an additional 15% of profit. Early in 1942 the cost of a destroyer escort was estimated at \$3,300,000; actual cost varied from \$1,500,000 to \$2,500,000 and under one contract which fixed the price at \$3,500,000 the cost was \$1,800,000, or a profit in the absence of renegotiation of 93.4%. A manufacturer holding a contract for 200 destroyer turbines produced the first turbine at a cost of \$2,559,000; the cost of the sixteenth turbine was about \$607,000.

The Bureau of Ordnance had a similar experience. The Oerlickon gun (20 mm.) with one type of mount was manufactured under a contract made in September 1941 at a price of \$7,531.42 per gun; under a contract dated in January 1943 the price was \$4,519.97. With another type of mount, a contract signed in September 1942 specified a unit price of \$6,330; a later contract dated May 1944 brought the price down to \$3,666. The same type of gun was made without mounts under a contract dated June 8, 1942, at a unit price of \$4,968.50; a contract dated May 5, 1944, specified a unit price ranging from \$2,133 down to \$1,708 as production increased.

³¹ Hensel affidavit, pars. 40-68 (R. 157-170).

The original contract made for Bofors guns (40 mm.) dated January 7, 1942, named a price of \$4,288 (without mounts); a contract of November 11, 1943, brought the price down to \$2,510.

The Bureau of Aeronautics, placing in most cases cost-plus-a-fixed-fee contracts, estimated in March 1942 for one type of plane a unit cost of \$100,000; the unit price was redetermined at \$58,000. Another contract made in May 1942 estimated the unit cost of a fighter frame at \$63,000; a later contract called for a unit price of \$39,000. Similar results were achieved in reducing costs of engines and propellers. These examples could be multiplied indefinitely.³²

By April 1942 the evidence of excessive profits realized under contracts placed during the National Defense Program had accumulated to the point that it was evident to Congress that some national program to cope with the problem was demanded. Hearings had been held by various Congressional committees which had developed instances of outrageous profits and scandalous charges to production costs.³³

To this accumulating evidence of profits already taken at the expense of the taxpayers was added the realization that the accelerated tempo of procurement after Pearl Harbor would inevitably aggravate cost abuses and multiply profit rates unless swift and effective steps were taken to establish controls. War profiteering on a scale unprecedented seemed imminent. It appeared that the public debt, growing by leaps and bounds to astronomical figures, was to be further enlarged to create a crop of war millionaires. Wide profit margins permitted scandalous waste of dollars which necessarily meant waste in irreplaceable man-hours and materials. Consumer purchasing power, already battering at inflation controls, threatened to be enormously magnified by profits from war.

But however serious this might be, however pressing the demand for stringent regulation, there was one demand more serious and more pressing—the demand of the fighting fronts for an ever increasing flow of war materials. War profiteering

³² See particularly Patterson affidavit, par. 16 (R. 66).

³³ Hensel affidavit, pars. 69–76 (R. 171–176) and 84 (R. 185).

could and should be stopped at any price—except a price paid in weapons and in war supplies. The delay involved in attempting to make the original pricing accurate when the situation made accurate pricing impossible might well imperil the entire war program; uncontrolled war profiteering could, however, have a similar result.

5. The practice of voluntary renegotiation ³⁴

The Services and responsible business leaders had long recognized the dilemma and had taken steps to solve it. The method adopted, voluntary adjustment of prices after production experience and voluntary refunds of excessive profits, was based on a traditional conception of fair dealing—that a supplier selling exclusively to a single buyer intends, and the buyer intends, that the price should be fixed to produce a fair margin of profit and that it should be adjusted to that end as circumstances change.

When in June 1943 the House Naval Affairs Committee investigated renegotiation, a number of the Nation's most prominent business men testified concerning the reasons for and the conceptions underlying voluntary price adjustments and voluntary profit refunds.³⁵ J. F. Metten, Chairman of the Board, New York Shipbuilding Corporation, pointed out that his organization was engaged in the construction of combat ships; that the company had been forced to bid "on top of the contingencies in order to be safe"; and that voluntary price adjustments had been made to avoid "embarrassing" excessive profits. Earl O. Shreve, Vice President, General Electric Corporation, testified that in 1940 General Electric established a policy of avoiding inordinate war profits by voluntary price reductions, reductions which during 1942 amounted to \$69,000,000. C. B. Lanman of the Ohio Nut and Washer Company explained that renegotiation would bring about immediate settlement of excessive profits problems, thereby avoiding years of postwar litigation, and as a result of Government review of war earnings, place industry beyond public criticism.

³⁴ Patterson affidavit, pars. 24-30 (R. 77-81); Hensel affidavit, pars. 89 and 90 (R. 188-189).

³⁵ "Legislative History of the Renegotiation Act," section IV, pp. 50-67.

Harry J. Defoe of the Defoe Shipbuilding Company, explained that early in 1942 "it became apparent that our profits were higher than we wanted to keep." The company reduced prices on outstanding contracts in an amount greater than \$5,000,000. Roger Williams, the Executive Vice President of Newport News Shipbuilding and Dry Dock Company, pointed out with respect to the construction of combat vessels that "if we should attempt to estimate carefully the cost of one of those units in advance we would probably spend as much time estimating it as we did in building it." The war-time job in his opinion required immediate production of the vessels and subsequent adjustment of prices. Mr. Williams also explained that the Renegotiation Act removed the possibility of stockholder suits questioning the right of corporations to make refunds to the Government.

Donaldson Brown, the Vice Chairman of General Motors Corporation, explained that early in 1942 General Motors realized that actual production costs would be substantially less than estimated costs; thereupon price reductions were initiated which by the end of the first quarter of 1943 had saved the taxpayers \$550,000,000. Roscoe Seybold explained that a similar policy had been adopted by Westinghouse Electric and Manufacturing Company, and a statement of like effect was filed by F. B. Rentschler on behalf of United Aircraft Corporation. To these voluntary refunds and price reductions must be added those by Jack & Heintz, Inc., of \$10,000,000, by Continental Motors Corporation of \$40,000,000, and by Sperry Corporation of \$100,000,000.³⁶

This was enough to point the way but it was not itself a solution to the problem. The amounts being recovered, although substantial, were only a fraction of the excessive profits realized. Furthermore, the refund practice as long as it remained on a voluntary basis inevitably penalized cooperative contractors. There was also grave doubt that even the most cooperative supplier could indefinitely continue making refunds while his less patriotic competitor accumulated inordinate reserves of excessive profits to strengthen his position in the postwar highly competitive world.

³⁶ Patterson affidavit, par. 25 (R. 77).

Thus the situation stood when the Supreme Court decided *United States v. Bethlehem Steel Corporation*, 315 U. S. 289, in February 1942. The Court held that the United States could not in the absence of Congressional action maintain a suit to recover excessive profits. Mr. Justice Black concluded his opinion by saying:

But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the Constitution has given to Congress, not to this Court, the power to make them (p. 309).

To the invention thus extended, Congress responded quickly. The Bethlehem decision is dated February 16. On March 28, Representative Case of South Dakota, explaining that he acted in response to the Supreme Court decision, introduced from the floor of the House an amendment to the Sixth Supplemental Appropriation Act, 1942. Congress was thereupon embarked upon one of the major legislative efforts toward one of the major legislative achievements of the war program.

6. Prior attempts at war profit control

Congress was not without experience in controlling or attempting to control war profits. The problem had recurred with increasing vigor in every war in which the United States was engaged. The Revolutionary War, the Civil War, the Spanish American War and the World War had all witnessed war profiteering and in each instance an effort had been made to provide controls. The record, however, was of outright, failure or of only partial success.

In general four types of control had been attempted. First, there was the cost-plus-a-percentage-of-cost or the cost-plus-a-fixed-fee contract. The former was an open invitation to extravagance in cost to increase profits and the latter, although limiting profits by naming a fixed profit figure, provided no incentive whatever to control costs, costs which in the end make up the bulk of the total expense to the public. Experience with these contracts had produced general agreement that they should be avoided if any alternative whatever was available. Second, there was excess profits taxation. This device, al-

though obviously an appropriate part of the war economy, had limitations which experience showed make it inadequate to meet the problem. A tax of less than 100% obviously left a margin in which war profits could accumulate. If that margin was 20% or even 10% and the base ran into millions of dollars, as it would with most of the significant producers of war material, there was still an opportunity for great accumulations of war profit with all that such profits implied in the way of impairment to morale, inflation and inefficient procurement. If the rate was adjusted upward to a full 100% the net result was a return to the cost-plus-a-fixed-fee contract, for the supplier knew that no matter how efficient or successful his operation his return would be limited to his return during the base year. The failure of the excess profits tax of the World War to control war profiteering had demonstrated the inadequacy of this method. Third, price ceilings were established. Although this was obviously a valuable measure, its purpose was not primarily the control of profits and it was not well adapted to that end. Since the full use of the entire productive capacity of the nation was absolutely essential, price ceilings necessarily had to be set at levels that would permit relatively high cost producers to continue to operate. This left wide margins within which low cost producers could accumulate excessive earnings. Price ceilings, furthermore, did nothing to control the enormous profits that tended to pile up merely as a result of the unprecedented increase in volume of production created by war demands. It appeared, too, that a price ceiling would hinder rather than assist the procurement of strictly military items and in September of 1942 these items, at the request of the Services, were exempted from the General Maximum Price Regulation.³⁷

Fourth, there had been attempts in the past to limit the amount of profit to a fixed percentage of the contract price or the contract cost. This was the proposal of the Case amendment and the profit limitation was fixed at 6%.

³⁷ Hensel affidavit, pars. 95-98 (R. 192-196).

7. The Case amendment and the impossibility of a rigid definition of excessive profits

The Services were quick to object to the Case amendment.³⁸ It was pointed out to begin with that the law would place on the War and Navy Departments an administrative burden which could not possibly be discharged. All the accountants in the country were far too few to audit every war contract and determine the allowable profit. Furthermore, the proposed limitation of 6% was grossly unfair. The appearance of uniformity hid the reality of rank discrimination. One contractor was financed by the Government; another financed his operation entirely from private capital. One contractor operated a plant constructed and owned by the United States; another operated his own plant and paid from his own pocket the entire cost of conversion. One contractor made simple products such as shoes or cloth; another made Norden bombsights or elaborate radar equipment. One contractor continued to produce by standard, time-proven manufacturing techniques; another contractor revised these techniques to make great savings in dollars, man-hours and critical materials. One contractor invented, after many weeks of work and with the exercise of a high degree of skill, a new model for a weapon or some other critical piece of equipment; another contractor invented or improved nothing but continued to produce great quantities of standard commercial articles. One contractor built his product from the basic raw material; another merely assembled what was already prepared by subcontractors. One contractor met or anticipated delivery schedules with a quality product; another was always in arrears furnishing at last goods of dubious usefulness. Under such circumstances, a 6% or any other rigid limitation necessarily sacrificed true fairness to a false and insignificant appearance of fairness.

Last of all, and this was conclusive, the Services pointed out that such a formula would impede and delay war procurement. The unfairness was itself one reason as was the waste of time

³⁸ "Legislative History of the Renegotiation Act," section 1B, pp. 3-10.

that would be required in long and expensive audits. Furthermore, such a profit limitation was for some highly important operations much too low. No one could spend six months providing a new gauge or a new pump to be sold for \$1,000 if the net return was to be limited to \$60. In addition, all small business was likely to be forced outside the war effort. The return on \$50,000 deliveries over a year's period would be much less than ordinary wages. To all this was added the general objection that such a fixed limitation was in result a return to cost-plus-a-percentage-of-cost contracts with all the waste of dollars, manpower, and materials that such contracts imply.

Since the Case amendment was adopted by the House on the very day it was proposed, these objections were of necessity presented first to the Senate and principally to a subcommittee of the Committee on Appropriations. The subcommittee accepted the conclusion that the amendment as offered would interfere with procurement, but insisted that some form of legislation be enacted. The Services then proposed that a Joint Resolution be adopted by Congress which would put the practice of voluntary renegotiation on a mandatory basis. The amendment, however, which was worked out by the Committee and offered by Senator McKellar on the floor of the Senate differed in material respects from the Services' recommendation. The McKellar Amendment, as the Services had requested, recognized and made mandatory the renegotiation of contracts and the refund of excessive profits, but in the last section of the bill there was set up a sliding scale of maximum allowable profits rates varying from 10% to 2% as the size of the contract increased.³⁹

But every objection that applied to the first attempt at rigid definition, the 6% limit of the Case amendment, applied with equal force to the second attempt, the definition by a sliding scale. After debate the Senate concluded, as it could not avoid concluding, that the sliding scale would defeat rather than serve the purposes of the legislation and accordingly it was withdrawn. Absent this section, the bill went to conference with the

³⁹ "Legislative History of the Renegotiation Act," section IC, pp. 11 and 12.

House, and the conference report recommended the legislation that was ultimately adopted.

The statute as thus enacted did not contain any detailed definition of excessive profits nor any formula pursuant to which the computation of excessive profits was to be made. The determination was to be by an exercise of judgment by the administrative officers. However, the factors that had to be considered in reaching such a judgment were well known to the representatives of the Services. For example, in March of 1942, prior to the Act, a memorandum was prepared in the War Department which was designed to guide War Department officials in conducting voluntary renegotiations. This memorandum (described in paragraph 27 of the affidavit of Robert P. Patterson and attached as Exhibit E to that affidavit) sets forth in detail the factors which are appropriate for consideration in distinguishing between reasonable and excessive profits. These same factors were referred to and explained in even more elaborate fashion in a War Department release of August 10, 1942, entitled "Principles, Policy and Procedure To Be Followed in Renegotiation," a copy of which is furnished to the Court with this brief. They were described again in the so-called Joint Statement of March 31, 1943, by the War, Navy, and Treasury Departments and the Maritime Commission of "Purposes, Principles, Policies, and Interpretations under the Renegotiation Act." When the Renegotiation Act was reenacted by the Revenue Act of 1943 this same list of factors which had from the very beginning been used as a guide in determining excessive profits was expressly adopted by the Congress and became Section 403 (a) (4) (A & B) of the amended statute.

8. The scope of the statute

Congress, having determined on renegotiation and the recapture of excessive profits as the method for controlling war profiteering, had, as part of the problem before it in April of 1942, the duty of defining the scope of operation of the statute. Since the Act was a war measure and an integral feature of the procurement program, its operation was and is confined to war business. The ordinary commercial contracts of a pro-

ducer and the profits on those contracts are in no way affected by the Renegotiation Act. The entire operation of the statute is related to contracts with the war agencies and the appropriate subcontracts and supply contracts. Every renegotiation begins therefore with a segregation of the war business from the commercial business of the contractor and the latter is left entirely undisturbed.

(a) *Application of the statute to subcontracts.*—Within the area of war business, however, no differentiation was made on the basis of the level of contracting. Subcontracts at every so-called tier, no matter how many steps removed from the prime contract, were and are made subject to renegotiation. On this point there was no debate. It was obvious that war profiteering was equally offensive to public policy, equally dangerous to morale, equally serious as a threat of inflation, equally wasteful of dollars, man-hours and materials, and equally burdensome to the taxpayer no matter at what level the profits arose. Furthermore, all the uncertainties of specifications, of design, of labor supply, of labor cost, of material supply, of material cost, etc., which made adequate pricing on prime contracts impossible were equally significant in subcontract pricing and had the same effect of making that pricing largely a matter of speculation. Indeed, the possibility of profit and price abuse at the subcontract and supply contract level was, if anything, greater than on prime contracts. Normally no representative of the public participated in the negotiation of subcontracts and supply contracts and there was inevitably an abiding temptation to prime contractors, particularly under the pressure of demands for immediate production, to obtain quotations from subcontractors and ultimate suppliers and pass these figures along to the Government as cost items or as the foundation of cost quotations without too much consideration of the propriety of the price. Furthermore, common fairness demanded that all producers of war material be treated alike, regardless of whether the particular contract was with the Government or with a Government contractor or his subcontractor or supplier. The result of these and similar considerations was that Congress, properly enough,

included as subject to renegotiation the entire hierarchy of war contractors and producers of war material.

(b) *Application of the statute to existing contracts.*—The remaining problem was to identify the contracts which, from the point of view of date of execution, would be subject to the Act. It would have been reasonable to require a refund of all excessive profits arising from business connected with the war, regardless of the date of the contracts. Such a provision would have had the merit of equal treatment for all suppliers. There was in the nature of things no particular reason why profits realized at any period after the nation began to arm should have been exempt; and certainly there would have been abundant justification for reaching all contracts executed and all profits realized after December 7, 1941. But Congress, as it was entitled to do, adopted a more conservative policy. Since the bill which included provisions for renegotiation was an appropriation bill directed primarily to the expenditure of public funds, it was provided that the statute should reach all war contracts and subcontracts, made before or after the date of its enactment, provided that final payment on the contracts had not been made on the date the statute became law; that is, on April 28, 1942. This was the most restricted provision that would serve the needs of the war program. As of April 28, 1942, there were outstanding uncompleted war contracts of a value considerably in excess of \$50,000,000,000.⁴⁰ Many of these contracts had substantial periods yet to run. The ship construction contracts of the Navy were particularly important.

In the summer of 1940 Congress authorized naval expansion programs of 11% and then 70%; the contracts were executed in the main by March of 1941.⁴¹ Most of these contracts were not completed until the latter part of 1942 and the early part of 1943. The construction of a battleship normally requires 32 to 35 months, of a carrier 17 to 21 months, and of a cruiser 22 to 25 months. It was apparent, then, in April 1942 that the war profits realized from the naval expansion program would

⁴⁰ Patterson affidavit, par. 38 (R. 88).

⁴¹ Hensel affidavit, par. 41 (R. 157).

be exempt from recapture unless the statute was made applicable to existing agreements. Furthermore, since during the early war period the difficulties of pricing were gravest and the necessity for speed was most imperative, it was with respect to these contracts that renegotiation was most necessary. Indeed, if the renegotiation program was to meet its war objective of controlling profiteering, maintaining morale and stimulating production, it was impossible to exempt these uncompleted contracts, bulking in total \$50,000,000,000. A war program for the control of war profiteering which did not reach this aggregate of agreements was scarcely more effective than no program at all.

9. The amendments to the statute

The Renegotiation Act first became law April 28, 1942, as Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942 (Pub. 528, 77th Cong.). The statute was first amended by Section 801 of the Revenue Act of 1942 (Pub. 753, 77th Cong., approved October 21, 1942). The statute, by that Act, was reenacted with clarifying amendments and the Treasury Department was added to the list of Departments whose contracts were subject to renegotiation. The statute was again amended by the Military Appropriation Act, 1944 (Pub. 108, 78th Cong., approved July 1, 1943). By this Act it was *expressly* provided that the contracts of the four Reconstruction Finance Corporation subsidiaries, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, were subject to renegotiation. Another amendment came by the Act of July 14, 1943 (Pub. 149, 78th Cong.), which *expressly* made the agreements of contract brokers subject to renegotiation. The purpose of the statute was "to prevent the payment of excessive fees or compensation in connection with the negotiation of war contracts." Then, by Title VII of the Revenue Act of 1943 (Pub. 235, 78th Cong., enacted February 25, 1944) the entire statute was amended and reenacted. On November 16, 1944, by Proclamation 2631 (9 F. R. 13739) the President, acting pursuant to authority conferred on him by the statute

extended the period of operation of the Renegotiation Act to June 30, 1945. And finally by Public Law 104, 79th Cong. 1st Sess. approved June 30, 1945, the period of operation of the Act was again extended, this time through December 31, 1945.

B

The constitutionality of the Renegotiation Act

1. Renegotiation as an exercise of the war power

The Renegotiation Act is an exercise of the power of the Congress to wage war. It is an exercise of that power which permits the government to control the price of every commodity bought and sold within the national boundaries (*Yakus v. United States*, 321 U. S. 414 (1944)); to fix the amount of rent to be charged for every room, home, or building and this even though to an individual landlord there may be less than a fair return (*Bowles v. Willingham*, 321 U. S. 503 (1944));⁴² to construct extensive systems of public works (*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936)); to operate railroads (*Northern Pacific Railway Company v. North Dakota*, 250 U. S. 135 (1919)); to prohibit the sale of liquor (*Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146 (1919)); to restrict freedom of speech in a manner that would be unwarranted in time of peace (*Schenck v. United States*, 249 U. S. 47 (1919)); to ration and allocate the distribution of every commodity important to the war effort (*Quart & Bro. v. Bowles*, 322 U. S. 398 (1944)); to restrict personal freedom of American citizens by curfew orders and designation of areas of exclusion (*Hirabayashi v. United States*, 320 U. S. 81 (1943)); and, finally, to demand of every citizen that he serve in the armed forces of the nation (*Falbo v. United States*, 320 U. S. 549 (1944); *Selective Draft Law Cases*, 330 U. S. 366 (1918)).

Mr. Justice Douglas said:

A nation which can demand the lives of its men and women in the wage of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property" (p. 519).

The war power of the national government is "the power to wage war successfully." See Charles Evans Hughes, *War Powers Under the Constitution*, 42 A. B. A. Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution, and progress of war.⁴³

It cannot be seriously contended that the war power, reaching as it does every activity relating to war and permitting national control over the lives and liberties of men, does not include the power to regulate war profiteering.

Furthermore, the Supreme Court has itself declared that Congress has power to control war profits. The final sentence of the opinion in *United States v. Bethlehem Steel Corporation*, 315 U. S. 289 (1942) reads:

But if the Executive is in need of additional laws by which to protect the nation against war profiteering, the

⁴³ Mr. Chief Justice Stone in *Hirabayashi v. United States*, 320 U. S. 81, 93 (1943).

Compare Mr. Justice Sutherland in *United States v. Macintosh*, 283 U. S. 605, 622 (1931) :

"From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams—'This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.' To the end that war may not result in a freedom of speech may, by act of Congress, be curtailed or denied so the morale of the people and the spirit of the army may not be broken; seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed and regulated; railways taken over and operated by the government; and drastic powers, wholly inadmissible in time of peace, exercised to meet emergencies of war."

Constitution has given to Congress, not to this Court, the power to make them (p. 309).

Here is full recognition, in the most explicit terms possible, of Congressional authority to regulate war profiteering.

2. Renegotiation as regulation

It is suggested that renegotiation is a taking of property for public use without payment of just compensation. This however, confuses the regulatory power of the Federal government with the power of eminent domain. Renegotiation is not in any aspect an exercise of eminent domain power. By the Renegotiation Act, Congress was neither authorizing requisitions nor in any way exercising eminent domain powers; Congress was, on the contrary, exercising its war powers for the purpose of eliminating war profiteering in order to maintain morale, control inflation, and promote efficiency in war production as well as to reduce the cost of the war to the nation. Renegotiation is wartime regulation just as wartime price control is regulation.

It seems obvious, too, that property delivered to the United States under a contract, and certainly property delivered to Douglas under a contract, is not "taken" by the United States in the constitutional sense. Appellants cite no case that holds or even intimates that property delivered under a contract is "taken" by the United States under the power of eminent domain. Such a conclusion would not only be a radical departure from common understanding but it would be departure with staggering implications. If receipt under a contract is a "taking," the United States must litigate the measure of just compensation for every single item of equipment and material which, to cite only one illustration, has been used by the armed forces in the war. And appellants' suggestion is even more ambitious. Appellants suggest not only that every delivery to the United States is a constitutional taking, but that every delivery to every contractor doing work on materials eventually to be used by the United States is a "taking" by the United States. The result of acceptance of this novel doctrine would be truly beyond imagination.

The fact of the matter is, of course, that the difference between a requisition by the United States and purchase by the United States is understood by everyone. And this common understanding is reflected in the acts of Congress. War purchasing was done primarily pursuant to Section 201 (50 U. S. C. A. Supp. III 611) of the First War Powers Act, 1941 (55 Stat. 839) as amended and Executive Order 9001 (6 F. R. 6787) as amended. Authority to requisition materials required for the defense of the United States was conferred upon the President by an entirely separate act, the Act of October 16, 1941 (55 Stat. 742, 50 U. S. C. A. Supp. III 721) and elaborate provision is made for the payment of just compensation, with the Court of Claims making the ultimate decision as to the amount to be paid. This statute, and indeed the entire history of Congressional legislation, demonstrates that Congress fully understands the power of eminent domain and the methods by which it may properly be exercised. It is equally plain that in the Renegotiation Act Congress was not in any way exercising eminent domain powers. The rules, therefore, and the cases which have to do with the permissible methods for determining compensation upon an exercise of eminent domain powers have nothing whatever to do with renegotiation. The limitations on renegotiation are the limitations appropriate to an exercise of the war power. The limitations on the exercise of eminent domain power are entirely irrelevant. Throughout most of their brief appellants recognize this fact. If renegotiation was eminent domain at work, all the talk by appellants about delegation of legislative power, about findings of fact, about notice and hearing, about secret data, about abrogation of private contracts would be meaningless. Appellants' argument and appellants' cases are addressed to the validity of regulation, not to the validity of condemnation.

Furthermore the method of regulation adopted by the Renegotiation Act, the requirement of a refund of excessive earnings, has been approved by the Supreme Court in *Dayton-Goose Creek Railway v. United States*, 263 U. S. 456 (1924) and in that case the contention of a taking of property without compensation was expressly rejected.

The Transportation Act of 1920 (41 Stat. 456) was enacted when, following the last war, the railroads were about to be returned to private ownership. The statute was designed to assist in the establishment of a system of railroad transportation adequate to the needs of the nation. The roads, many of them, were weak both in financial structure and as operating organizations. Congress conferred on the Interstate Commerce Commission broad remedial powers. The Commission was authorized, among other things, to make such rate adjustments as might be advisable, and pursuant to that authorization substantial rate increases were ordered. *Ex Parte* 74, 58 I. C. C. 220. These rates were set, and Congress recognized that under the circumstances they had to be set, not carrier by carrier, but on a nation-wide or regional basis. Congress realized however, that a uniform rate for all carriers in a rate group would inevitably result in high earnings for the efficient and low earnings for the inefficient roads. A rate high enough to maintain the inefficient carrier, whose roads were necessary to an adequate transportation system, would necessarily yield to efficient lines a return in excess of a fair return. The answer to this dilemma was Section 15a (49 U. S. C. 15a) which provided, in substance, that the earnings of a carrier in excess of 6% of the value of its aggregate property were to be divided—one half retained by the carrier for limited purposes and the other half to be transferred to and used by the Commission as a revolving fund to make loans to other carriers.⁴⁴

Acting pursuant to the statute the Commission determined the aggregate value of the Dayton-Goose Creek road, determined the amount of profit realized by the road in excess of 6% of the value, and directed that one-half of this amount be paid to the Commission. The order and the statute were attacked as contrary to the Constitution. It was argued that the recapture provision was not a regulation of interstate com-

⁴⁴ Section 15a was repealed by the Emergency Railroad Transportation Act of 1933 (48 Stat. 226). In 1933 the railroads because of the depression had no funds to discharge obligations to the I. C. C. which had earlier accrued and such monies as were available were urgently needed to pay operating expenses. Furthermore it was extremely unlikely under prevailing business conditions that any excessive profits would be earned in the foreseeable future. See House Report No. 193, 73rd Congress, 1st Session.

merce but a taking of private property without compensation; that if any refund could constitutionally be required the refund must be to the shippers who had paid the rate charges and not to the United States; that the rates under which the profits were earned were not in fact excessive; that the effect of the statute was to work an arbitrary discrimination between efficient and inefficient carriers; that the statute made no proper provision for the consideration of deferred liabilities; that recapture of profits arising from both intrastate and interstate business violated the Tenth Amendment; that the actual value of the road was in excess of the value fixed by the Commission, etc.

To all these objections the Supreme Court replied with a sweeping opinion holding in substance that the objective of maintaining an adequate transportation system was, under the Constitution, a legitimate objective of the Federal Government and that the recapture of excessive profits was well adapted to achieve that objective and was therefore lawful. The discussion in this and other opinions relating to the recapture clause⁴⁵ is phrased in terms appropriate to the regulation of rates under the commerce clause. But the conclusion, that recapture of excessive profits, if related to a legitimate objective of the Federal Government, is within the power of that Government, sustains under the Constitution not only Section 15a of the Transportation Act but also the Act of Congress now before the court. For however wide the argument in this case may become and whatever may be the turn that it takes, there can never be a dispute that renegotiation was a necessary, an integral and an essential part of the war program. This is as far beyond reasonable doubt as it is beyond reasonable doubt that success in the war was a legitimate and constitutional objective of the Federal Government.

⁴⁵ See *Wisconsin R. R. Commission v. C. B. & Q. R. R. Co.*, 257 U. S. 563 (1922); *The New England Divisions Case*, 261 U. S. 184 (1923); *St. Louis and O'Fallon R. Co. v. United States*, 279 U. S. 461 (1929); *Richmond, F. & P. R. Co. v. McCarl*, 62 F. (2d) 203 (D. C. App., 1932). Compare the cases sustaining pooling arrangements under which money demands are made upon one member of a group to protect the interests of the entire group. *Noble State Bank v. Haskell*, 218 U. S. 104 (1911); *United States v. Rock Royal Co-op.*, 307 U. S. 533 (1939).

3. The contention of unlawful delegation of legislative power

Appellants contend that the statute unlawfully delegates legislative power to the renegotiating officials. This contention, so often made and so seldom accepted, has as little validity here as in the hundreds of other cases where it has been urged unsuccessfully. There are many reasons:

(a) Congress fully discharged its constitutional duty to legislate and conferred no legislative power on the renegotiating officials;

(b) The courts have always recognized that war legislation, such as the Renegotiation Act, requires the delegation of broad powers to executive officers;

(c) The standards established by the Act are more than sufficient to meet constitutional requirements; and

(d) In any event, Congress ratified and adopted the very elaborate and detailed administrative standards.

(a) Congress discharged its constitutional duty to legislate and conferred no legislative power on the renegotiating officials

The obligation of Congress to legislate is at most an obligation to do three things: to consider the problem before the nation; to reach a policy decision; and to select the method for making the policy conclusion effective. No one familiar with the legislative history of the Renegotiation Act can contend that Congress either failed to consider the problem of war profiteering, or failed to make the policy determination that excessive war profits must be eliminated, or failed to give careful consideration to the available methods for bringing about that result. The choice was between some rigid formula (such as the 6% limitation of Representative Case or the sliding scale arrangement of Senator McKellar) and an exercise of administrative judgment. Congress, after careful consideration and in order to be fair to all war contractors and to avoid crippling the war procurement program (See Section A-7 of this brief), chose the second alternative. There was, therefore, on the record, a full discharge by the Congress of its legislative functions.

Furthermore, the duties assigned to the administrative officials under the Act are in no way legislative duties. The essence

of legislation is the enactment of general rules having general application. The Act does not contemplate that the renegotiating officials shall formulate such general rules. What the Act contemplates is, on the contrary, a case by case consideration of the circumstances of each individual contractor and a judgment in each case as to whether the profits realized are excessive. There is no authority whatever to sustain an argument that delegation to administrative officials of power to make a case by case determination is a delegation of legislative power and no court has ever held unconstitutional a statute which required this case by case consideration.

Since Congress, on the record, discharged its constitutional duty to legislate and since no legislative power was conferred on the renegotiating officials, there has been no violation of the Constitution and a consideration of the presence or absence of "standards" in the statute is, strictly speaking, irrelevant. However, the statute does contain such "standards." The phrase "excessive profits" is itself a sufficient guide to judgment. It is not an empty phrase of exhortation. For the business community and for renegotiating officials it is weighted with content for it is read in the light of the common understanding that customary business practice contemplates a fair and reasonable profit. The determination of fair profit in any particular case calls inevitably for a judgment, but for a judgment within a generally understood range and exercised in the light of generally accepted practices. The range of fair profit is, within limits, well outlined by ordinary business practice, by tax rates, by rates of return allowed by public utility commissions, by statutory rates of return such as the Vinson-Trammel Act, by interest rates during peacetime as a manifestation of fair return on money invested, by usury laws and other statutes fixing legal rates of interest, by banking standards and the everyday business technique of capitalizing return as a method of determining value, by average corporate dividends, by rates of return on preferred stocks, by insurance company guarantees on annuity contracts, by profit allowances on cost-plus-a-fixed fee contracts, etc. For more particular guidance there is the generally prevailing rate of return in the industry in question and, of course, the prior financial history of the particular con-

tractor. Add to this the more critical and crucial items, the problems and achievements of the contractor in war work, and a foundation is laid upon which a determination of excessive profits can be made quickly, sensibly and with sufficient accuracy to command general acceptance.

To the standard thus provided by the phrase "excessive profits" the statute adds the further guide of the Internal Revenue Code. Section 403 (c) (3) of the Act reads in part:

In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code.

Chapter 1 of the Internal Revenue Code, consisting of some 400 sections, is the chapter which levies the Federal income tax. Chapter 2E, consisting of some 80 sections, levies the Federal excess profits tax. There is thus made available to guide the renegotiating officials the most elaborate and detailed instructions concerning profits known to the law. Under these circumstances it can hardly be said that the administrative officers are left without Congressional direction, and proof, if proof be needed, that the standards of the Act are sufficiently accurate for the purposes intended, is furnished in overwhelming proportions by the single fact that in 97.5% of the renegotiation proceedings agreement has been reached as to the amount of excessive profits to be refunded.⁴⁶ It is submitted that if the renegotiating officials and the contractors can in more than 97% of the cases reach agreement as to what the statute intends, no legitimate or even significant complaint can be made about the absence of standards.

(b) War legislation requires delegation of broad powers to administrative officials

No court has ever held unconstitutional on the the grounds of delegation of legislative power a statute enacted pursuant

⁴⁶ Patterson affidavit, par. 41 (R. 89).

to the federal war power.⁴⁷ On the contrary, the Supreme Court has repeatedly recognized that a war is primarily a legislative and an executive job with the division of authority to be as Congress sees fit. *Highland v. Russell Car Co.*, 279 U. S. 253, 261 (1929); *Stewart v. Kahn*, 78 U. S. 493, 506 (1870). In *Hirabayashi v. United States*, 320 U. S. 81 (1943), it was forcefully pointed out that Congress in the exercise of the war power has wide authority to determine "the nature and extent of the threatened injury and in the selection of the means for resisting it." And the court said:

Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, *it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs* (p. 93).

A striking illustration of the extent to which Congress may, during a period of war, delegate power to executive officials is furnished by the Second War Powers Act, the Act of June 28, 1940 (54 Stat. 676) as amended (50 U. S. C. A. Supp. III 633). The entire national program for rationing and allocation of materials was founded upon a single sentence of the statute.

Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary for appropriate in the public interest and to promote the national defense.

⁴⁷ See *United States v. Wright*, 48 F. Supp. 687 (1943) :

"* * * With the question of delegation so fixed, I find that no court has ever attempted to strike down what Congress has determined to be appropriate to carry into effect its broad war powers under the Constitution. In fact, the question of the delegation has seldom, if ever, appeared in connection with a construction of the war power. * * *

This almost unlimited delegation of power to the President has been uniformly sustained as within constitutional government.⁴⁸ If under the exigencies of war Congress can delegate to the President power to ration and allocate "any material or facility" as to which there is a shortage in any manner that he deems appropriate "in the public interest and to promote the national defense," it is difficult to believe that Congress cannot leave to administrative officials the much simpler and more limited task of exercising a case by case judgment of excessive profits.⁴⁹

(c) The standards of the Renegotiation Act are sufficient to meet the requirements of peacetime legislation

Even if the Renegotiation Act were adopted in times of peace for peacetime purposes, the standards established by the Act would be more than sufficient to meet the requirements of the Constitution. The general principles which have guided the Supreme Court in deciding questions of delegation of legislative power place the propriety of this statute far beyond dispute. These principles were recently announced by Chief Justice Stone in *Yakus v. United States*, 321 U. S. 414 (1944):

The Constitution as a continuously operative charter of government does not demand the impossible or the

⁴⁸ *O'Neal v. United States*, 140 F.(2d) 908 (C. C. A. 6, 1944), certiorari denied, 322 U. S. 729; *United States v. Randall*, 140 F. (2d) 70 (C. C. A. 2, 1944); *Gallagher's Steak House v. Bowles*, 142 F. (2d) 530 (C. C. A. 2, 1944), certiorari denied, 322 U. S. 764; *Country Garden Market, Inc. v. Bowles*, 141 F. (2d) 540 (D. C. App., 1944), certiorari denied, 322 U. S. 752; *Walter Brown & Sons v. Bowles*, 58 F. Supp. 323 (1944); *United States v. Tire Center, Inc.*, 50 F. Supp. 404 (1943).

⁴⁹ See also *United States v. Chemical Foundation*, 272 U. S. 1 (1926) sustaining a statute providing that the Alien Property Custodian "shall have power to manage such property and do any act or things in respect thereof * * * in like manner as though he were the absolute owner thereof," and *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163 (1919) accepting a Joint Resolution of Congress providing that the President "is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or take possession * * * of any telegraph, telephone, marine cable, or radio system * * *."

For cases sustaining delegation of broad powers to executive officials in the comparable field of foreign affairs, see *Hampton & Co. v. United States*, 276 U. S. 394 (1928); *United States v. Curtiss-Wright Corp.*, 299 U. S. 304 (1936); *United States v. Bush*, 310 U. S. 371 (1940).

impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.

* * * * *

As we have said, "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality * * * to perform its function." *Curriu v. Wallace, supra*, 15. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. See *Union Bridge Co. v. United States*, 204 U. S. 364, 386. Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare *M'Culloch v. Maryland*, 4 Wheat., 316, 413 *et seq.* It is free to avoid the rigidity of such a system which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. Cf. *Hampton & Co. v. United States, supra*, 408, 409 (pp. 424, 425, 426).

Certainly, if, as the Chief Justice says, the Constitution does not demand the impracticable, nor require that Congress become a fact-finding body, nor deny Congress the resources of flexibility, nor confine Congress to that method of executing its policy which involves the least delegation to administrative officials, certainly if these things are true, the statute before the Court is beyond question.

This conclusion is sustained by a host of decisions which have approved standards far less definite and far less specific than the standards of the Renegotiation Act.

(i) *The standard of "necessary."*—Against a contention of unlawful delegation of legislative power, the Supreme Court

has frequently approved statutes in which the only standard of action furnished to the administrative officials was the instructions to take such action as might be necessary to effectuate the legislative policy.

1. Congress authorized the Secretary of War "*to do everything by him deemed necessary to * * * prevent the keeping * * * of houses of ill fame * * * within such distance as he may deem needful of any military camp * * **" Approved in *McKinley v. United States*, 249 U. S. 397 (1919).

2. A state board was authorized to regulate the sale of illuminating oil and "*to adopt standards of safety, purity or absence from objectionable substances * * * which they may deem necessary to provide the people of the state with satisfactory illuminating oil.*" Approved in *Red "C" Oil Co. v. North Carolina*, 222 U. S. 380, 390 (1912).

3. The Secretary of the Interior, exercising control over national forests, was authorized "*to make such rules and regulations and establish such service as will insure the objects of such reservation * * **" Approved in *United States v. Grimaud* 220 U. S. 506, 515 (1911).

4. The Secretary of Agriculture was directed to issue, after notice and hearing, an order which would "*tend to effectuate the declared policy of this title * * **" Approved in *United States v. Rock Royal Co-op.*, 307 U. S. 533, 542 (1939).

Indeed, statutes vesting in administrative officers a general and unconfined power to issue regulations and to make specified determinations have been held to involve no delegation of legislative power.

5. Congress provided "That the Secretary of the Treasury, upon the recommendation of the said board, *shall fix and establish uniform standards* of purity, quality and fitness for consumption of all kinds of teas imported into the United States * * *." Approved in *Buttfield v. Stranahan*, 192 U. S. 470, 471 (1904).

6. Congress authorized the Secretary of the Interior "*to make rules and regulations governing the use of roads * * *, including the fixing and collection of tolls where deemed necessary and advisable in the public interest.*" Approved by this Court in *Rogge v. United States*, 128 F. (2d) 800 (C. C. A.

9, 1942), certiorari denied, 317 U. S. 656, against the contention that the absence of any congressional standard as to amount of the tolls resulted in an unlawful delegation of legislative power.

These cases make it clear that, had Congress so desired, powers much broader than those granted by the Renegotiation Act could have been lawfully delegated to the administrative officials. Since the policy of the statute against war profiteering is plain, Congress could have, under the authority of these cases, delegated to the Secretary of War, for example, authority to take such action as would "tend to effectuate the declared policy" against profiteering or "to do everything by him deemed necessary" for that purpose or "to make such rules as will insure" achievement of the national objective—authority certainly far more extensive than that provided in the existing statute. And if administrative officials may be allowed to establish "uniform standards of purity, quality and fitness for consumption" and "standards of safety, purity or absence of objectionable substances," it is difficult to see why they may not on a case-to-case basis determine whether profits are "excessive." The formulation of general standards of purity or safety is certainly more legislative in character than is a determination based upon the facts of each case that a portion of the profits received by a contractor are excessive.

(ii) *The standard of "public interest."*—That administrative officers of the Government may be allowed to apply standards much more elusive than the standards of the Renegotiation Act is demonstrated by the enabling acts establishing the best known of the Federal administrative agencies.

1. The Interstate Commerce Commission, in authorizing one railroad to lease the facilities of another, is directed to apply the standard of "the public interest." See *United States v. Lowden*, 308 U. S. 225, 230 (1939); *New York Central Securities Co. v. United States*, 287 U. S. 12 (1932).

2. The Federal Communications Commission must regulate radio stations "as public interest, convenience or necessity requires." See *National Broadcasting Co. v. United States*, 319 U. S. 190 (1943).

3. The Federal Trade Commission is directed to eliminate "unfair methods of competition." See *Federal Trade Commission v. Keppel & Bro.*, 291 U. S. 304, 310 (1934).

It seems self-evident that the test of "excessive profits" is much less indefinite and much less legislative in character than the formula "as the public interest may require."

(iii) *The standard of "reasonable."*—Finally there are many decisions recognizing the propriety of delegating to administrative officials the power to make a judgment as to what is fair and reasonable under the circumstances. "Fair," "just" and "reasonable," without further definition, have been accepted as adequate standards. "Excessive" is only the obverse side of "reasonable" and is therefore equally valid.

1. Congress authorized the President to suspend duty-free importation of certain products whenever the tariffs of other countries were "*reciprocally unequal and unreasonable*." Approved in *Field v. Clark*, 143 U. S. 649, 680 (1892).

2. In 1889, Congress provided "That whenever the Secretary of War shall have reason to believe that any railroad or other bridge * * * is an *unreasonable obstruction*" to navigation, steps should be taken by him to require the owners "to alter the same as to render navigation through or under it reasonably free, easy and unobstructed * * *." Approved in *Union Bridge Co. v. United States*, 204 U. S. 364 (1907)⁵⁰

3. The Transportation Act of 1920 authorized the Interstate Commerce Commission to make "reasonable" rules for alleviating shortages of equipment. See *Avent v. United States*, 266 U. S. 127 (1924).

4. Congress levied a tax of 8% on amounts paid for transporting oil and provided that if no charge had been made, the tax was to be "on the basis of a *reasonable* charge for such trans-

⁵⁰ "By the statute in question Congress declared in effect that navigation should be free from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. *In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power*" (pp. 385-386).

portation, as determined by the Commissioner." Approved by this Court in *Standard Oil Co. v. McLaughlin*, 67 F. (2d) 111 (C. C. A. 9, 1933), certiorari denied, 292 U. S. 631.⁵¹

Here is authority in abundance to support the proposition that a standard of "fair," a standard of "just" a standard of "reasonable," is, *without further definition*, an adequate standard. Administrative officials receiving grants of power to determine what is "reasonable," necessarily and inevitably are authorized to determine what is "excessive."⁵² These cases, therefore, must be included among those which give to the Renegotiation Act the support of unequivocal precedent. And to all this must be added the express recognition by the Supreme Court of the propriety of establishing a standard by the use of a single word such as "just" or "reasonable" or "excessive."

⁵¹ See also *La Forest v. Board of Commissioners*, 92 F. (2d) 547 (D. C. App., 1937), certiorari denied, 302 U. S. 760. Congress delegated to the Commissioners of the District of Columbia power "to make, modify, repeal, and enforce *usual and reasonable* traffic rules and regulations relating to vehicles * * *."

⁵² It is difficult to believe that the authors of the Constitution intended to forbid the use by Congress of the word "excessive" as a guide to the determination of legal rights since the Constitution makes personal liberty itself turn upon an understanding of "excessive." The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Similar provisions appear in state constitutions. See, for example, Article I, Section 6 of the California Constitution:

"Right to bail—Rights of witnesses; All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned."

If "excessive" is sufficiently precise in meaning to constitute an adequate statement of constitutional rights affecting personal liberty, it surely is sufficiently precise to be an adequate guide to administrative officials.

The test of "excessive" is frequently used in state legislation. For example, Section 657 of the California Code of Civil Procedure lists as a ground for a new trial: "Excessive damages, appearing to have been given under the influence of passion or prejudice."

For other illustrations, see the statutes referred to in *Greenwood County v. Shay*, 23 S. E. (2d) 825 (S. C. 1943) (excessive punishment); *Taylor v. Koenigstein*, 260 N. W. 544 (Neb. 1935) ("excessive drinking"); *Alexander v. Able*, 70 S. E. 1009 (S. C. 1911) ("excessive" rent distraint); *State v. Small*, 11 N. W. (2d) 377 (Iowa, 1943) (excessive punishment).

In *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 398 (1940), Mr. Justice Douglas said:

The problem of fixing reasonable prices for bituminous coal cannot be differentiated legally from the task of fixing rates under the Interstate Commerce Act (41 Stat. 484, 49 U. S. C. § 15) and the Packers and Stockyards Act (42 Stat. 166, 7 U. S. C. § 211). The latter provide the *standard of "just and reasonable"* to guide the administrative body in the rate-making process. The validity of that standard (*Tagg Bros. & Moorhead v. United States*, *supra*), the appropriateness of the *criterion of the "public interest"* in various contexts (*New York Central Securities Corp. v. United States*, 287 U. S. 12, 24; *United States v. Chemical Foundation*, 272 U. S. 1; *Avent v. United States*, 266 U. S. 127), the legality of the *standard of "unreasonable obstruction"* to navigation (*Union Bridge Co. v. United States*, 204 U. S. 364) all make it clear that there is a valid delegation of authority in this case. (P. 398.)

Indeed, to strike down at this late date a statute which provides the single word "reasonable" or "just" as the standard for the administrative action would be to repudiate the established practice of many decades in the regulation of public utilities. The conventional statute, enacted not only by Congress but in virtually every state of the Union, authorizes a public utilities commission to fix "reasonable" rates. Traditionally, there is no definition of the term "reasonable." See, for example, the provisions of the Transportation Act, 49 U. S. C. A. 15:

Whenever, after full hearing, * * * the commission shall be of opinion that any individual or joint rate, fare or charge * * * is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, * * * the commission is authorized and empowered to determine and prescribe what will be the just and reasonable, individual or joint, rate, fare, or charge * * *.

The provisions of the Public Utilities Act of California, Section 32, are typical of many state statutes:

Whenever the Commission * * * shall find that the rates * * * are unjust, unreasonable, discriminatory or preferential, * * * the Commission shall determine the just, reasonable or sufficient rates * * *.

For this Court to hold now that a standard of "reasonable" or "excessive" is not an adequate standard would not only repudiate what has been accepted without question for many decades, but it would cast doubt upon the validity of much federal legislation and virtually every public utility act on the statute books of the states.

(iv) *The cases cited by appellants.*—The cases cited by appellants demonstrate appellees' contentions. Those cases, by illustrating the type of statute which involves a delegation of legislative power, serve to distinguish a valid statute such as the Renegotiation Act. Appellants rely on language from the opinions in *Panama Refining Company v. Ryan*, 293 U. S. 388 (1935) and *Schechter Poultry Corporation v. United States*, 295 U. S. 495 (1935)⁵³ and on three cases arising under the Lever Act. In the *Panama* case, Congress had authorized the President, if, as and when he thought it desirable, to issue a general order prohibiting the shipment in interstate commerce of oil produced in excess of state quotas, so-called hot oil. Since Congress itself had neither condemned nor condoned hot oil shipments and had thus failed to establish a policy, and since the President was empowered to issue a general order, without case-by-case consideration, the Supreme Court held Congress had attempted to authorize the President to legislate. The Renegotiation Act is in no way comparable. The policy of the statute is fixed by the *direction* to eliminate excessive profits and case-by-case consideration, rather than a general order, is

⁵³ The *Panama* and *Schechter* cases together with *Carter v. Carter Coal Company*, 298 U. S. 238 (1936) have resulted in a great deal of controversy as fruitless as it seems endless. Torn from its context, the language of Mr. Chief Justice Hughes is used to create a debate about the validity of every act of Congress delegating power to an administrative agency. The debate has never failed to end in a decision sustaining the statute.

required. In the *Schechter* case Congress attempted to empower the President to give the force of law to so-called codes of fair competition. The codes could and did include any and every provision deemed desirable by its authors, the members of industry committees. This the Court held was legislation by the President and the committee members. The Renegotiation Act is very different. Certainly, a statute authorizing case-by-case determination of excessive profits cannot fairly be compared to a statute authorizing the unlimited regulation of industry.

The three cases arising under the Lever Act upon which appellants rely⁵⁴ do not touch upon the problem before the Court. They deal not with the propriety of delegation of power to Government officials but with a very different problem, the problem of the duty of Congress when, *without administrative assistance*, Congress itself seeks to define crimes or to declare transactions unlawful. In the *Cohen Grocery* case Congress did not authorize a Government official to fix reasonable prices but attempted to obligate each seller to make that decision for himself in each sale transaction on peril of criminal penalties if a jury should later come to a different conclusion. Nothing like this is in any way involved in renegotiation. The *Small Co.* case applies the *Cohen Grocery* case to a situation in which a defendant sought to avoid his contractual obligations by contending that the price he agreed to pay was an unjust charge and therefore unlawful. Here no such effort is made. The Government seeks only to prevent unjust enrichment of appellants at public expense by enforcing a conclusion reached by a duly authorized Government official, after a hearing, that on its total renegotiable business for 1942 appellants realized excessive profits.⁵⁵

⁵⁴ *United States v. Cohen Grocery Co.*, 255 U. S. 81 (1921); *Weeds v. United States*, 255 U. S. 109 (1921); *Small Co. v. American Sugar Co.*, 267 U. S. 233 (1925).

⁵⁵ It is worth noting that Justices Pitney and Brandeis, dissenting in the *Small Co.* case, found nothing vague in the constitutional sense in the phrase "excessive prices" even for purposes of a criminal case. "Excessive profits" has even less inherent uncertainty. Prices range widely, fluctuating violently under some circumstances from one day to the next. Rate of profit in American business experience fluctuates much more narrowly and customary profit lies within well understood limits.

The controlling distinction, however, is that this case involves the propriety of a delegation of power to a Government official to make specific what the statute provides in general terms. In the Lever Act cases upon which appellants rely, there was no such delegation.⁵⁸ The importance of the difference is abundantly clear. The Lever Act method of price control, without the aid of administrative tribunals, was held unconstitutional. The current method of price control, with the aid of administrative officials, is constitutional. *Yakus v. United States*, 321 U. S. 414 (1944). This forcefully illustrates what Chief Justice Taft pointed out in *Mahler v. Eby*, 264 U. S. 32, 41 (1924), a case cited by appellants. In distinguishing the *Cohen Grocery* case he said:

In those cases, statutes were held invalid for vagueness. They were both criminal cases in which the uncertain words of the statute encountered the limitation of the Fifth and Sixth Amendments. They did not inform the accused sufficiently of the nature and cause of the accusation. *The rule as to a definite standard of action is not so strict in cases of the delegation of legislative power to executive boards and officers* (p. 41).

The Supreme Court has itself declared, therefore, that appellants' cases are not to be accepted as guides in deciding the question before this Court.

(v) *Mutual Film Corporation v. Ohio Industrial Commission*.—If a single case were to be selected as a complete answer to appellants' arguments, this decision, reported at 236 U. S. 230 (1915), might well be chosen.

Ohio passed a law establishing a board of censors to review motion pictures. Section 4 of the statute provided:

Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board (p. 240).

⁵⁸ Note, however, that when the President, acting pursuant to the Lever Act, fixed prices by an administrative determination, his action and the statute were sustained. *Highland v. Russell Car Co.*, 279 U. S. 253 (1929). And note too the care with which the court in the *Small Co.* case pointed out that there was no applicable administrative action.

In reply to the claim that this was unlawful delegation of legislative power, Mr. Justice McKenna said:

The objection to the statute is that it furnishes no standard of what is educational, moral, amusing or harmless, and hence leaves decision to arbitrary judgment, whim, and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the "personal equation" to enter, resulting "in unjust discrimination against some propagandist film," while others might be approved without question. But the statute by its provisions guards against such variant judgments, *and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies.* This has many analogies and direct examples in cases, and we may cite *Gundling v. Chicago*, 177 U. S. 183; *Red "C" Oil Manufacturing Co. v. North Carolina*, 222 U. S. 380; *Bridge Co. v. United States*, 216 U. S. 177; *Buttfield v. Stranahan*, 192 U. S. 470. See also *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86. If this were not so, the many administrative agencies created by the state and National governments would be denuded of their utility and government in some of its most important exercises become impossible.

* * * * *

We may close this topic with a quotation of the very apt comment of the District Court upon the statute. After remarking that the language of the statute "might have been extended by descriptive and illustrative words," but doubting that it would have been the more intelligible and that probably by being more restrictive might be more easily thwarted, the court said: "In view of the range of subjects which complainants claim to have already compassed, not to speak of the natural development that will ensue, it would be next to im-

possible to devise language that would be at once comprehensive and automatic”⁵⁷ (pp. 245–247).

Just as “moral,” “educational,” and “harmless” are standards which “get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct,” so does the phrase “excessive profits” have precision from the sense and experience of men and that phrase too, as the history of renegotiation so abundantly demonstrates, is a certain and useful guide in reasoning and conduct. And just as the Ohio statute “might have been extended by descriptive and illustrative words” this statute might have been extended, but here as there it is by no means clear that it would have been “the more intelligible.”

(d) Congressional approval of administrative practice

When the Revenue Act of 1942 was before the Senate Finance Committee, the renegotiating departments presented certain amendments to the Renegotiation Act which were designed to clarify the statute.⁵⁸ During the committee hearings, a War Department representative was asked to explain the practice of the Departments in arriving at a determination of excessive profits. In direct response to this inquiry the War Department release of August 10, 1942, (filed with this brief) was submitted to the committee.⁵⁹ The full committee appointed a subcommittee to give further attention to the proposed amendments. The release of August 10 was filed with the subcommittee.⁶⁰ Pages 12 to 16 of this release state very elaborate and detailed standards for determining excessive profits. Those standards were necessarily approved by Congress when, with full understanding of the administrative practice, Title VIII

⁵⁷ Compare the decisions accepting statutes against the contention that critical terms were not adequately defined. *Shields v. Utah-Idaho R. Co.*, 305 U. S. 177, 180 (1938) ; *Pittsburgh Glass Co. v. Board*, 313 U. S. 146, 165, (1941) ; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 400 (1940). Mr. Justice Douglas said :

“That guide is sufficiently precise for an intelligent determination of the ultimate question of fact by experts.”

⁵⁸ “Legislative History of the Renegotiation Act”, Section II, pp. 22–42.

⁵⁹ “Legislative History of the Renegotiation Act”, paragraph II A 1, p. 23.

⁶⁰ “Legislative History of the Renegotiation Act”, paragraph II B1, p. 32.

of the Revenue Act of 1942 was passed reenacting the significant sections of the Renegotiation Act. It was expressly provided that the statute, as thus amended, was effective as of the date of the original enactment.

Since the determination of appellants' excessive profits was made on February 2, 1944, long after the amendments of October 21, 1942, approving the administrative practice, there can now be, under settled law, no complaint based on an alleged lack of standards in the original statute or any claim of injury to appellants because of the absence of such standards. *Hirabayashi v. United States*, 320 U. S. 81 (1943), to name only one case, holds that under circumstances such as those before the Court, any objection based on delegation of legislative authority is foreclosed. Pursuant to an executive order issued on February 19, 1942, curfew regulations were promulgated by Army officials on March 2 and March 16, 1942. By the Act of March 21, 1942, Congress provided that failure to comply with these curfew regulations was a misdemeanor. The Supreme Court found that the regulations issued under the executive order were before Congress when it considered the Act of March 21, 1942, and that the purpose of that statute was to provide a method for enforcement of the executive order and regulations issued pursuant to it. It was argued that the regulations were void as an attempt by the executive to exercise legislative powers. This objection, the Court held, was foreclosed by the Act of March 21, 1942, since Congress by that Act ratified and confirmed the prior executive orders.

Mr. Chief Justice Stone said:

The conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066. *Prize Cases*, 2 Black 635, 671; *Hamilton v. Dillin*, 21 Wall. 73, 96-97; *United States v. Heinszen & Co.*, 206 U. S. 370, 382-384; *Tiaco v. Forbes*, 228 U. S. 549, 556; *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 146-148; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 300-303; *Mason Co. v. Tax Comm'n*, 302 U. S. 186, 208. And so far as it lawfully could, Congress authorized and implemented such curfew orders as the commanding officer should promulgate

pursuant to the Executive Order of the President. The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of (p. 91).⁶¹

The parallel between this case and the *Hirabayashi* case is precise. Here as there a contention is made of delegation of legislative power. Here as there, action was taken by executive officers of the Government which was said to be without proper congressional direction. Here as there, this executive action was brought to the attention of Congress and Congress thereafter passed a statute which constituted approval of the executive action. And accordingly, here as there, no question of delegation of legislative authority remains open. Whatever difficulties may be found in the original act, the amendments of October 21, 1942, merged the detailed administrative practice with the statute in a manner to foreclose all possibility of further doubt.⁶²

Appellants' contention of unlawful delegation of legislative power cannot be supported either by principle or by precedent.

⁶¹ Accord: *United States v. Von Clemm*, 136 F. (2d) 968 (C. C. A. 2, 1943), cert. den. 64 S. Ct. 81. For other cases recognizing that reenactment of a law ratifies the administrative practice see *Latimer v. United States*, 223 U. S. 501, (1912); *Hacht v. Malley*, 265 U. S. 144 (1924); *Sessions v. Romadka*, 145 U. S. 29, 42 (1892).

⁶² Appellants' brief criticizes Sec. 403 (d) of the Act which provides that in determining excessive profits, no allowance shall be made for salaries "in excess of a reasonable amount" or for "excessive reserves" or for costs which are "excessive and unreasonable." These determinations are, of course, incidental to the final determination of excessive profits and all the reasons which justify administrative flexibility in reaching the ultimate conclusion justify the same flexibility in deciding these subordinate matters. Furthermore, long established tax practice makes it clear that there is nothing unlawful in a delegation to administrative officials to determine the reasonableness of salaries, costs and reserves. Sec. 23 of the Internal Revenue Code provides deductions from gross income. As every taxpayer knows, these deductions are reviewed and redetermined by the Commissioner of Internal Revenue. The authorized deductions include:

(A) "All the *ordinary* and necessary expenses * * *."

(k) Worthless debts "or a *reasonable* addition to a reserve for bad debts."

(l) "A *reasonable* allowance" for depreciation "(including a *reasonable* allowance for obsolescence)."

Furthermore Section 403 (c) (3) of the Act directs that the Secretaries

4. Renegotiation as the administrative recapture of excessive profits

The Renegotiation Act is the legislative formulation of the voluntary practice worked out by the business community and the Services to eliminate excessive profits. That practice, as it developed prior to the statute, had two aspects. If the contracts under which the excessive profits were accruing were, on the date of review, still in operation, reductions in the contract price were frequently effected. If, however, deliveries under the contracts had terminated and full payment had been made to the contractor in accordance with the contract terms, the elimination of the excessive profits required a cash refund to the Government. It is this latter practice which, somewhat inaccurately, has been termed "renegotiation." As a matter of actual operation, renegotiation does not involve any modification of contract prices. On the contrary, the statute contemplates and requires not a reconsideration of prices but the consideration of profits, total profits on all war business. If those profits are excessive, a refund is demanded without regard to contract prices. The Government in this case has undertaken to do no more than to require a cash refund of excessive earnings; there has been no modification of or tampering with contractual obligations. What has happened is that profits of appellants in the hands of appellants have been found to be excessive and a refund has been demanded. The order of the Under Secretary does not refer to or direct the modification of any contract price.

It should be noted, furthermore, that the demand for a refund of excessive war profits is entirely lawful regardless of the date of the subcontracts; and hence even if it were shown on this record, which it is not, that some of appellants' subcontracts included in renegotiable business were made before April 28, 1942, the result would not be affected. There is no principle of law which frees from the operation of an Act of Congress profits realized on contracts executed before the date

shall be guided by the provisions of the Internal Revenue Code. Those provisions, among the most detailed in the law, are certainly an adequate guide to administrative action. If they were not every Revenue Act would for that reason be unconstitutional.

of the statute. This is illustrated by all tax legislation since every Revenue Act in some way reaches profits realized on contracts executed prior to the date of the Act.

(a) *Taxation of earnings realized on contracts executed prior to the Revenue Act.*—That taxation of profits derived from contracts antedating the revenue act is lawful was recognized at least as early as 1830. In *Providence Bank v. Billings*, 4 Pet. 514 (1830), Mr. Chief Justice Marshall said:

Land, for example, has, in many, perhaps, in all the states, been granted by government, since the adoption of the constitution. This grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee. *Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases* (p. 561).

There has been no dissent from this conclusion. On the contrary, on every occasion when the question has been presented to the Supreme Court the Court has ruled in favor of the power to tax. For example, in *Kehrer v. Stewart*, 197 U. S. 60 (1905), Georgia levied a tax on agents of packing houses doing business in the state. It was contended that the tax was unconstitutional because it reduced earnings under an employment contract executed before the date of the statute. In dismissing this contention the Court said:

The argument that the tax impairs the obligation of a contract between the petitioner and Nelson Morris & Company is hardly worthy of serious consideration. The power of taxation overrides any agreement of an employe to serve for a specific sum. His contract remains entirely undisturbed (p. 70).

Again in *Barwise v. Sheppard*, 299 U. S. 33 (1936), it was held that an oil and gas lease, antedating the statute, could not in any way limit the power of the state to lay an excise tax on production of oil and to determine between the lessor and lessee who should pay the tax.

Additional decisions, each to the same effect, include *Chanler v. Kelsey*, 205 U. S. 466, 479 (1907); *Moffitt v. Kelly*, 218 U. S. 400, 404 (1910); *Lake Superior Mines v. Lord*, 271 U. S. 577 (1926); *United States Trust Company v. Helvering*, 307 U. S. 57, 60 (1939); and *Illinois Central Railway Company v. Minnesota*, 309 U. S. 157, (1940), in which Mr. Justice Douglas said:

* * * liability for retroactive taxes is "one of the notorious incidents of social life" (p. 165).

The Government submits that if, as these cases demonstrate, there is no constitutional objection to the recapture of earnings on pre-existing contracts by an exercise of the tax power there certainly can be no objection to the recapture of excessive war profits on pre-existing contracts by an exercise of the much broader war power. This is not to say that renegotiation is taxation. Renegotiation is not taxation. It has never been so considered by Congress or anyone else who gave serious thought to the question. Renegotiation is not undertaken primarily to provide revenue to the Government; it is undertaken as a war measure because the control of war profiteering is an essential feature of a successful war program. The Renegotiation Act is not a tax measure any more than the Transportation Act of 1920, calling as it did for payment of excessive earnings to the United States, was a tax measure. *Dayton-Goose Creek Railway v. United States*, 263 U. S. 456 (1924). But the tax cases do demonstrate that there is nothing in the Constitution nor in any principle of constitutional law which can be said to exempt from governmental action profits earned on contracts antedating an act of Congress. The establishment of any such principle would not only be an unwarranted and unprecedented restriction on the war power of the Federal Government, but it would inevitably defeat the revenue policies of the United States and repudiate principles and practices which have been accepted for more than a hundred years.

(b) *Congressional modification of existing contracts*.—Renegotiation conducted by way of a demand for a cash refund does not call for modification of contract obligations. It calls for the regulation of war profiteering by recapture, through ad-

ministrative action, of excessive profits on total war business. Strictly speaking there is, therefore, no occasion to consider the power of the Government to modify contractual obligations. However, there is no doubt that the Government does have that power. The power of the Federal Government to modify contracts between private persons in order to achieve a legitimate national objective has always been recognized by the Supreme Court. The classic statement of the rule is by Mr. Chief Justice Hughes in *Norman v. B. & O. R. Co.*, 294 U. S. 240 (1935):

Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them (pp. 307-308).

Similar expressions are found in *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 434, 438 (1934).

Not only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interest of its people. *It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect."* *Stephenson v. Binford*, 287 U. S. 251, 276, 53 S. Ct. 181, 189, 77 L. Ed. 288.

* * * * *

The argument is pressed that in the cases we have cited the obligation of contracts was affected only incidentally. This argument proceeds upon a misconception. *The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.*

The illustrations could be multiplied indefinitely. See, for example, Mr. Justice Holmes in *Hudson Water Co. v. McCarter*, 209 U. S. 349, 357:

One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.

Mr. Justice Harlan in *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, 482 (1911):

The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable.

And Mr. Justice Van Devanter in *Producers Transp. Co. v. R. R. Comm.*, 251 U. S. 228, 232 (1920):

That some of the contracts before mentioned were entered into before the statute was adopted or the order made is not material.

This principle, that rights established by preexisting contracts are subject to regulation designed to further legitimate national objectives, has been recognized over and over again by the Supreme Court. In addition to the cases cited above see *Faitoute Co. v. Asbury Park*, 316 U. S. 502 (1942) (state regulation of insolvent municipalities); *Overnight Motor Co. v. Missel*, 316 U. S. 572 (1942) (Congressional regulation of wage rates); *Henderson Co. v. Thompson*, 300 U. S. 258 (1937) (state regulation of use of natural gas); *Stephenson v. Binford*, 287 U. S. 251 (1932) (state regulation of charges of motor carriers); *Dillingham v. McLaughlin*, 264 U. S. 370 (1924) (state regulation of small loan business); *New York v. United States*, 257 U. S. 591 (1922) (Congressional regulation of railroad

fares); *Block v. Hirsh*, 256 U. S. 135 (1921) (Congressional regulation of rents); *Thornton v. Duffy*, 254 U. S. 361 (1920) (state compensation laws); *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899) (Congressional regulation of combinations in restraint of trade); *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746 (1884) (state slaughterhouse regulation); *Stone v. Mississippi*, 101 U. S. 814 (1879) (state regulation of lotteries); *Beer Co. v. Mass.*, 97 U. S. 25 (1877) (state regulation of the manufacture of liquors).

That the war program required that the Renegotiation Act be made applicable to contracts and subcontracts existing on April 28, 1942, has been explained. On that date there were outstanding procurement commitments by the United States in an amount in excess of \$50,000,000,000.00. The renegotiation program if it was to be successful had to reach profits realized on these early contracts executed without production experience and when the emergency of the nation was the greatest and the demand for war material at any price the most urgent. The action of Congress in making profits realized on contracts existing on April 28, 1942, subject to the statute was compelled in order to control war profiteering, just as the control of war profiteering was compelled in order to achieve success in the war program. The power of Congress to enact a war program adequate to preserve the nation cannot be defeated by the action of private parties in entering into contracts.⁶³

⁶³ Appellants had no government contracts and accordingly no question is now presented as to the power of the Government to modify or recapture the profits from its own contracts. *Lynch v. United States*, 292 U. S. 571 and *Perry v. United States*, 294 U. S. 330 can therefore have no application here. The distinction made in the gold clause cases between modification of the provisions of a Government Liberty Bond and modification of bonds of a private corporation may, when the question is presented, require special attention to Government contracts. It is the Government's position (a) that a procurement contract is by its very terms a fluid arrangement that contemplates such modification as may be necessary to achieve fairness; (b) that *Perry v. United States*, 294 U. S. 330 (1935), relates to the borrowing power of the Federal Government and the status of the public debt rather than to regulation of ordinary contractual obligations; (c) that the war power overrides any and all contracts since it is inconceivable that Congress can bargain away its power to preserve the existence of the nation; and (d) that in any event the administrative recapture of excessive profits does not involve any modification of contract provisions.

5. Provision for notice and hearing

It is suggested that the Act is unconstitutional because it does not expressly require a hearing before a determination is made that excessive profits have been realized. This suggestion is wide of the mark for several reasons:

First, it fails to recognize that the statute requires "renegotiation." The term "renegotiation" obviously implies meetings and conferences with the contractor and, as paragraph 46 of the Patterson affidavit explains (R. 91), the Services have been exceedingly careful to give contractors every opportunity to present evidence and argument.

Second, as the order of the Under Secretary demonstrates (R. 7) a hearing was in fact given to appellants and when a hearing has in fact been granted the presence or absence of an express statutory requirement for hearing becomes immaterial. *Detroit Ry. v. Osborn*, 189 U. S. 383, 391 (1903).⁶⁴

Third, there is no constitutional requirement that every statute provide expressly for a hearing. If under the circumstances due process requires a hearing, the Constitution itself protects the litigant; and if, on the other hand, due process does

⁶⁴ For additional cases recognizing that a systematic practice of administrative hearings, even though not expressly required by the statute, satisfies due process requirements see the decisions sustaining the rationing provisions of the Second War Powers Act and particularly *Steuart & Bro. v. Bowles*, 322 U. S. 398, 401 (1944); *Waller Brown & Sons v. Bowles*, 58 F. Supp. 323 (1944); *Country Garden Market v. Bowles*, 141 F. (2d) 540 (D. C. App. 1944) cert. den. 322 U. S. 752.

Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915) is a different case. A Florida statute authorized a judgment creditor of a corporation to levy execution on the property of a shareholder without notice to the shareholder. A levy was made on the property of Coe, who filed a petition to quash the execution. The Supreme Court held that the statute "thus construed, and as applied to this case," was contrary to due process because no provision was made for notice to and hearing of the shareholder. The significant feature of this case is that the Florida statute and the practice under the statute would permit execution upon and sale of a shareholder's property without notice to him unless, as in the case of *Coe*, he obtained notice by accident—and the court pointed out that this accidental or casual notice was not a substitute for official notice. The situation with respect to renegotiation is entirely different: (a) because the statute itself speaks of "renegotiation" which plainly implies and has been interpreted to imply meetings with the contractor, and (b) because the official practice gives full notice and hearing (R. 91).

not require a hearing, obviously Congress is not obligated to provide for one. The rationing provision of the Second War Powers Act says nothing about a hearing and, as has been pointed out, the validity of the statute is now settled. For another illustration see 39 U. S. C. A. 259, the statute pursuant to which the Postmaster General issues fraud orders.⁶⁵

Fourth, appellants cannot complain since the statutory right to be heard for which they contend was accorded them by the Revenue Act of 1943, which became effective February 25, 1944, only three weeks after the Under Secretary determined the amount of their excessive profits. Section 403 (e) (2) of Title VII specifically provided that all persons in the position of appellants should have ninety days after February 25, 1944, to apply to the Tax Court for a de novo redetermination of the amount, if any, of their excessive profits. By incorporating sections of the Internal Revenue Code provision was made in the statute for traditional Tax Court notice and hearing, notice and hearing of the kind a litigant receives in a District Court of the United States. Since appellants did not go to the Tax Court when the opportunity was made available obviously they were not injured by, nor can they now complain about, any supposed deficiency in the original act.⁶⁶

⁶⁵ For further illustrations of statutes authorizing administrative action without making specific requirement for a hearing see *Field v. Clark*, 143 U. S. 649 (1892) ; *Buttfield v. Stranahan*, 192 U. S. 470 (1904) ; *United States v. Grimaud*, 220 U. S. 506 (1911) ; *McKinley v. United States*, 249 U. S. 397 (1919).

⁶⁶ Appellants suggest on page 65 of their brief that prior to the amendments of February 25, 1944, the statute expressly provided against judicial review. Appellants are in error. Sec. 403 (c) (4) to which they refer has to do only with the degree of finality that attaches to agreements signed by the Government and the contractor, closing agreements similar to those authorized by section 3760 of the Internal Revenue Code. Appellants signed no such agreement. Prior to February 25, 1944, the statute said nothing about review of an order such as the order entered in this case. Compare *Stark v. Wickard*, 321 U. S. 288 (1944) and *Stewart & Bro. v. Bowles*, 322 U. S. 398, 403 (1944). See also *Carter v. Bowles*, 56 F. Supp. 278, 282:

"The validity of the statute and the regulations promulgated thereunder are attacked on the ground that no provision is made by the statute itself for judicial review of the administrative action taken pursuant thereto. It is well settled, however, that without special statutory provisions therefor, the courts of the United States may, in the exercise of jurisdiction conferred

6. Finality of Tax Court determinations of amount

It is argued that the provision of the Act making final Tax Court determinations of amount offends the rule of *Ex parte Young*, 209 U. S. 123 (1907). That case condemns a statute which imposed "fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation * * *." There are no such fines or penalties imposed by the Renegotiation Act and the opportunity to test the validity of the legislation is entirely unrestricted—as this case demonstrates. The Renegotiation Act does not deny access to the courts. It says only that on questions of amount—not on constitutional or other questions—the conclusion of the expert body, the Tax Court, shall be final. This does not differ from many other provisions for administrative finality⁶⁷ and never has it been held that such provisions offend the rule of *Ex parte Young*. On the contrary, it is recognized that the language of the statute must be read with the Constitution and the courts will grant such judicial action as the Constitution requires. *Crowell v. Benson*, 285 U. S. 22 (1932). Furthermore, since plaintiff has not invoked the Tax Court remedy he has not been injured by, and accordingly he cannot debate here, the validity of the provision making the Tax Court decision on amount questions

upon them by general statutory provisions, enjoin the enforcement of orders of executive agencies to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted power. *Stark v. Wickard*, 321 U. S. 288, 64 S. Ct. 559, 571. This, of course, accords judicial review to the extent necessary to protect constitutional rights; and such review plaintiff is receiving in the suit presently before the court."

⁶⁷ See, as examples, *Crane v. Hahlo*, 258 U. S. 142 (1922) approving a New York statute which provided that an award by a board of assessors of damages from street construction "shall be final and conclusive upon all parties and persons whomsoever with respect to the amount of damage sustained"; *Hilton v. Merritt*, 110 U. S. 97 (1884) and *Passavant v. United States*, 148 U. S. 214 (1893) sustaining provisions making valuation determinations of customs officials final; and *United States v. Ju Toy*, 198 U. S. 253 (1905) and *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320 (1909) upholding the finality of executive action in connection with immigration matters. Compare *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551 (1928) and *Heiner v. Diamond Alkali Co.*, 288 U. S. 502 (1933) denying judicial review of Board of Tax Appeals decisions on excess profit questions arising from the hardship sections of the Revenue Act of 1918.

final. *Voeller v. Neilston Co.*, 311 U. S. 531, 573 (1940); *Tyler v. Judges*, 179 U. S. 405 (1900); *Hendrick v. Maryland*, 235 U. S. 610 (1914).

7. The attack on the order

(a) *The order has become final and is now free from attack.*— This failure to take advantage of the Tax Court right of re-determination forecloses any objection to the terms of the order of the Under Secretary of War. After ignoring the right to de novo reconsideration appellants cannot object to formal or technical defects, real or imaginary, in a decision which was sufficiently fair that they were unwilling to ask for redetermination. In American courts failure to appeal waives all objections to the original adjudication; it does not preserve for collateral attack technical deficiencies which would have been remedied by the reviewing tribunal.

Since appellants failed to take advantage of an opportunity for de novo redetermination of the amount of their excessive profits in a forum whose procedures assure fair hearings and fair decisions⁶⁸ appellants have in law accepted the order of the Under Secretary. This is, of course, a familiar rule, as familiar as the rule that the failure to appeal from a judgment renders that judgment immune from collateral attack.

⁶⁸ *Dobson v. Commission*, 320 U. S. 489, 498 (1943):

"The court [the Tax Court] is independent, and its neutrality is not clouded by prosecuting duties. *Its procedures assure fair hearings.* Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures. It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer. Individual cases are disposed of wholly on records publicly made in adversary proceedings, and the court has no responsibility for previous handling. Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts, Consideration of uniform and expeditious tax administrations require that they be given all credit to which they are entitled under the law."

The principle is given general application by the courts. If, for example, a tax is assessed in an amount that is claimed to be unreasonable and by procedures that are claimed to be arbitrary and the taxpayer fails to take advantage of administrative procedures for redetermination, the original assessment becomes final and beyond attack.

Utley v. St. Petersburg, 292 U. S. 106, 109 (1934):

This court will not listen to an objection that the charge has been laid in an arbitrary manner when an administrative remedy for the correction of defects or inequalities has been given by the statute and ignored by the objector (p. 109).

Milheim v. Moffat Tunnel District, 262 U. S. 710 (1943):

It is contended that the Commission arbitrarily adopted an *ad valorem* basis of appraisal for the apportionment of benefits to the several parcels of land within the District without reference to the actual benefits to each. This argument erroneously assumes that the Commission had finally adopted such an *ad valorem* basis for its appraisal. This is not the case. It had merely adopted a tentative *ad valorem* basis, subject to modification and corrections, before final confirmation, after the hearing of objections filed by landowners; of which public notice was given. These landowners did not seek to have the Commission modify or correct this tentative basis of apportionment or file any objections to the appraisal of benefits to their properties. Presumably if the tentative appraisal was made on an erroneous basis it would have been modified upon a proper showing. *Having failed to object to the tentative ad valorem basis adopted by the Commission or to appear before it for the purpose of obtaining modifications or corrections as to their lands before the final adoption of such basis, they have here no sufficient ground of complaint.* Where a city charter gives property owners an opportunity to be heard before a board respecting the justice and validity of local assessments for proposed public improve-

ments and empowers the board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot be heard to complain of such assessments as unconstitutional. *Farncomb v. Denver*, 252 U. S. 7, 11 (pp. 723-724).

This rule applies generally to all administrative orders and determinations. A failure to take advantage of administrative or statutory methods for review renders the administrative order immune from attack.⁶⁹ Examples of orders held to have become final through failure to take advantage of special review procedures, include:

(a) A reparation order issued by the Secretary of Agriculture under the Perishable Agriculture Commodities Act.

Abe Rafelson Co. v. Tugwell, 79 F. (2d) 653 (C. C. A. 7, 1935):

Having failed to pursue its remedy provided by this amendment, wherein it could have, in the District Court, raised all proper questions, including the validity of the challenged sections, we will not now consider their constitutionality (p. 655).

(b) An order of the Secretary of Agriculture fixing fees under the Packers and Stockyards Act.

Inghram v. Union Stock Yards Co., 64 F. (2d) 390 (C. C. A. 8, 1933):

Such order cannot be attacked by a defense to collection of charges which are in compliance with an order of the Secretary (p. 392).

(c) An order of the Secretary of Agriculture requiring payments into a milk settlement fund under the Agriculture Marketing Agreement Act of 1937.

⁶⁹ Compare the rule forbidding consideration of a contention that carrier tariffs filed with the Interstate Commerce Commission are unreasonable and unlawful in a criminal action charging failure to comply with the tariffs. *Lehigh Valley R. Co. v. United States*, 188 Fed. 879 (C. C. A. 3, 1911); *United States v. Vacuum Oil Company*, 158 Fed. 536 (D. C., W. D., N. Y., 1908).

United States v. Ridgeland Creamery Co., 47 F. Supp. 145 (D. C. W. D. Wis., 1942):

Where, as here, Congress has created a special administrative procedure providing for a review by the Secretary of Agriculture of the United States of actions and determinations of the Market Administrator, and which, as here, meet all requirements of due process, that remedy is exclusive, *and this court has no jurisdiction to review the actions and determinations of the Market Administrator, except in proceedings under Section 8c (15) (B) of the Agricultural Marketing Agreement Act of 1937* (p. 149).

(d) An order of the Securities and Exchange Commission passing on the validity of security transactions.

Berg v. Cincinnati, Newport & Covington Ry., 56 F. Supp. 842 (1944):

Since the first two of these claims have been passed upon by the Securities and Exchange Commission I must hold as a matter of law that this court cannot consider them further (p. 848).

(e) An order of the Federal Power Commission licensing the construction of a power project.

Harris v. Central Nebraska Public Power & Irr. Dist., 29 F. Supp. 425 (D. C. D. Nev., 1938):

The license granted was in accord with the law. It was within the power of the Commission. It was issued after a showing made, and findings of fact duly entered. *May this Court, given no jurisdiction in the Act itself to review, in this collateral proceeding now try the matter de novo? We think not, and so hold* (p. 428).

(f) An order of the Administrator of the Wage and Hour Division of the Department of Labor fixing wage rates under the Fair Labor Standards Act of 1938.

Walling v. Cohen, 48 F. Supp. 859 (1943), affirmed 140 F. (2d) 453:

Not having challenged the validity or applicability of the wage orders before the Administrator or the Cir-

cuit Court of Appeals, despite notice that those orders included hat manufacturing operations, defendants cannot cast upon the plaintiff in this proceeding for the enforcement of those orders the burden of establishing the scope of the investigation leading to their promulgation (p. 863).

(g) A cease and desist order of the Federal Trade Commission.

United States v. Piuma, 40 F. Supp. 119 (1941), affirmed 126 F. (2d) 601, cert. den. 317 U. S. 637.

Considering the scheme of the statute in its entirety, it is apparent that the defendant is not entitled thereunder to a trial in this court on facts determined by the Commission. *Defendant's opportunity to challenge the Commission's findings was lost when he failed to petition for review prior to May 20, 1938.* Giving finality to the order of the Commission when the defendant has the right of appeal is consonant with due process. *Shields v. Utah Idaho Cent. R. Co.*, 305 U. S. 177, 59 S. Ct. 160, 83 L. Ed. 111 (p. 122).

As these cases demonstrate the courts have not hesitated to attach finality to administrative orders where interested or aggrieved persons have failed to exercise appeal privileges. The rule forbidding collateral attack on orders which have thus become final is, of course, essential to the orderly administration of justice. If after ignoring special review procedures a litigant can challenge an administrative order in any court under any circumstances, all special procedures provided by Congress become interesting but futile gestures toward the more intelligent handling of litigation. Unless litigants are required to exercise their rights in special tribunals or abide the consequence, every attempt by Congress to improve government by the use of expert tribunals and procedures specially adapted to the particular problem will be defeated at the outset.

The failure of the appellants to seek relief in the Tax Court was a decision to accept the conclusion of the Under Secretary that excessive profit of \$110,000.00 had been realized. Appellants must abide by that decision.

(b) *Findings of fact.*—Even if the order were now subject to attack there is no basis on which that attack might be made. The order itself demonstrates that appellants received fair treatment. It points out that appellants hold contracts subject to renegotiation; that renegotiation took place pursuant to the provisions of the Act; that the Under Secretary considered financial, operating, and other data submitted by appellants or obtained from reliable sources; that appellants were granted full opportunity to submit additional information and to present their contentions at hearings of which due notice was given; that consideration was given to the information furnished and the contentions presented; and, finally, that it was determined that \$110,000 of the profits (subject to tax credit) realized by appellants on renegotiable business during the fiscal year ending December 31, 1942, were excessive. Bearing in mind the opportunity for Tax Court de novo redetermination it is difficult to see how more could be asked of the Under Secretary.

It is true that there are in the order no detailed findings of evidentiary facts.⁷⁰ There is neither an occasion for nor a

⁷⁰ Appellants' brief suggests but does not argue that the *statute* is void because it does not by its terms expressly require that findings of fact be made. There is no rule of law that every statute must, on peril of offending the Constitution, contain an express requirement for findings of fact. Such a rule would invalidate most of the more important Congressional legislation. (See the monographs accompanying the report of the Attorney General's Committee on Administrative Law.) The cases cited by plaintiff, *Mahler v. Eby*, 264 U. S. 32, 44 (1924), and *Wichita R. R. v. Public Utilities Commission*, 260 U. S. 48, 58 (1922), are concerned not with the validity of a statute but with the validity of an administrative order and they condemn the order because of a failure to include findings which the statute specifically required. In the *Panama Refining* case, Mr. Chief Justice Hughes was not suggesting that the Constitution required that Congress insert in each statute a demand for findings; he was only pointing out that the act before him contained nothing, neither a statement about findings nor anything else, from which Congressional policy could be determined. In any event, this Court has expressly approved a statute which says nothing about findings of fact. *Rogge v. United States*, 128 F. (2d) 800 (C. C. A. 9, 1942), cert. den. 317 U. S. 656, and the Supreme Court has taken the same action on many occasions. See, for example, *McKinley v. United States*, 249 U. S. 397 (1919); *United States v. Grimaud*, 220 U. S. 506 (1911).

requirement of such findings.⁷¹ Detailed findings are useful only if review of the decision is confined to determining whether there is evidence to support the findings. Here there is no review of the Under Secretary's conclusion but a redetermination de novo. Under such circumstances, a requirement for detailed findings would only impose on the Services an onerous task which could serve no useful purpose.⁷² In any event, this Court has definitely and specifically rejected appellants' contention. In *Rogge v. United States*, 128 F. (2d) 800 (C. C. A. 9, 1942) cert. den. 317 U. S. 656 this Court said:

Appellants also urge that the road regulation is invalid because the Secretary made no finding of fact that the public interest necessitated the toll, citing *Panama Refining Co. v. Ryan*, 293 U. S. 388, 431-433, 55 S. Ct. 241, 79 L. Ed. 446. The situation is controlled by the later Supreme Court decisions holding that "It is settled that to all administrative regulations purporting to be made under authority legally delegated there attaches a presumption of the existence of facts justifying the specific exercise." *Thompson v. Consolidated Gas Co.*, 300 U. S. 55, 69, 57 S. Ct. 364, 371, 81 L. Ed. 510; *Pacific States B. & B. Co. v. White*, 296 U. S. 176, 185, 56 S. Ct. 159, 80 L. Ed. 138, 101 A. L. R. 853.

(c) *Consideration of materials beyond the record.*—The suggestion that the order discloses a violation of the rule of *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U. S. 292 (1937) is in error. That case holds that the final conclusion of a rate-making body must be based on the record

⁷¹ The order of the Under Secretary contains as much detail as the orders quoted by the Supreme Court in *Hampton & Co. v. United States*, 276 U. S. 394, 403 (1928), and *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 312 (1936).

⁷² The letter sent by appellants' attorneys to the Secretary of War (R. 215) was a request for information made, as the letter states, pursuant to Sec. 701 of the Revenue Act of 1943. The reply points out quite correctly that Congress did not make the Sec. 403 (c) (1) retroactive and the Board declined to give the statute a retroactive effect when Congress had not so provided. Appellants' letter, furthermore, was written two months after the Under Secretary reached his conclusion and a month after appellants had been granted the right to de novo proceedings in the Tax Court.

in the particular case, not on materials which are otherwise relevant but which are not in the record. There is nothing whatever to indicate any contrary practice by the Under Secretary. The order points out that the Under Secretary considered data relating to appellants' profits which was submitted by appellants or obtained from governmental or other reliable sources. It goes on to say that appellants were granted full opportunity to submit additional information and to present their contentions, and there is nothing to indicate that during the course of the negotiations appellants requested and were refused access to anything in the record. Surely appellants cannot insist that the Government close its eyes to all data except that produced by them.

However, the significant fact is that the determination of the Under Secretary was not, unless appellants chose to make it so, the final determination. The cases which appellants cite all relate to final orders. As the opinion in the *Ohio Bell* case points out neither that decision nor appellants other cases have application where as here further de novo administrative proceedings are contemplated.⁷³ On the contrary, it is recognized that due process requires no more than one opportunity to be heard and if that opportunity is available preliminary action need not meet any formal requirements. In ordinary tax practice assessments are made and deficiencies asserted without notice and hearing and upon evidence known only to the collector. The courts recognize that if the taxpayer has an opportunity to be heard before the assessment becomes irrevocable due process is satisfied. *Utley v. St. Petersburg*, 292 U. S. 106 (1934),⁷⁴ and *McGregor v. Hogan*, 263 U. S. 234

⁷³ "We have pointed out elsewhere that under the statutes of Ohio, no provision is made for a review of the order of the Commission by a separate or independent suit. *West Ohio Gas Co. v. Public Utilities Comm'n* (No. 1), 294 U. S. 63, 68. A different question would be here if such a suit could be maintained with an intermediate suspension of the administrative ruling. * * * In Ohio the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts *upon the record made below, and not upon new evidence*" (p. 303).

⁷⁴ The court said:

"There is no constitutional privilege to be heard in opposition at the launching of a project which may end in an assessment. It is enough that a hearing is permitted before the imposition of the assessment as a charge

(1923).⁷⁵ A tentative valuation of property for rate-making purposes may be made ex parte. *Delaware & Hudson Co. v. United States*, 266 U. S. 438 (1925). And provisional rates may be placed in operation. *The New England Divisions Case*, 261 U. S. 184 (1923). Preliminary appraisals of property for eminent domain purposes without a hearing are constitutional. *Bragg v. Weaver*, 251 U. S. 57 (1919).⁷⁶ And compare the cases sustaining summary destruction of foodstuffs. *Adams v. Milwaukee*, 228 U. S. 572 (1913); *North American Storage Co. v. Chicago*, 211 U. S. 306 (1908); *Lawton v. Steele*, 152 U. S. 133 (1894). If under the Constitution the very fundamentals of due process, notice and hearing, can be disregarded in making the preliminary determination, it is self-evident that there can be no technical and formal requirements as to the language of the order.

In any event and for the reasons and upon the authority heretofore set forth appellants' failure to seek the relief to which they were entitled in the Tax Court forbids consideration now of any contention addressed to the validity of the order entered by the Under Secretary.

upon the land (*Chicago, M., St. P. & P. Ry Co. v. Risty*, 276 U. S. 567; *Londoner v. Denver*, 210 U. S. 373, 378; *Goodrich v. Detroit*, 184 U. S. 432, 437), or in proceedings for collection afterwards." (p. 109)

⁷⁵ The opinion points out:

"The requirement of due process is that after such notice as may be appropriate the taxpayer have opportunity to be heard as to the amount of the tax by giving him the right to appear for that purpose at some stage of the proceedings before the tax becomes irrevocably fixed. *Turner v. Wade*, *supra*, p. 67. And see *Londoner v. Denver*, 210 U. S. 373, 385.

"And since this act, although not providing for notice and hearing before the assessment by the Board of Assessors, grants the taxpayer after due notice the right to a hearing before arbitrators who shall finally assess and fix the valuation of his property, we find in its provisions no want of that notice and hearing which is essential to due process" (p. 237).

⁷⁶ The court said:

"But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court carrying with it a right to have the matter determined upon a full trial. *United States v. Jones*, 109 U. S. 513, 519; *Backus v. Fort Street Union Depot Co.*, *supra*, p. 569. And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal" (P. 59).

The burden, therefore, is, and properly should be, upon an interested person to act affirmatively to protect himself.

Red River Broadcasting Co. v. Federal Communications Comm., 98 F. (2d) 282, 286 (D. C. App., 1938).⁷⁷

CONCLUSION

In considering appellants' contentions and in measuring the Renegotiation Act against the Constitution it is well to bear in mind that the United States is not, as it is in the Selective Service Act, asserting power over the person of its citizens. It is not even, as in the wartime revenue acts, taking an increased percentage of normal earnings. It is only saying on behalf of the public that public peril shall not be private good fortune, that no citizen shall at public expense increase his personal profit from public disaster, that the common misfortune of war shall not be the occasion for conferring on a special group unreasonable, excessive and abnormal rewards. Reduced to its bedrock terms a challenge to the Renegotiation Act on constitutional grounds is the assertion that the Constitution protects earnings inflated by war; that the abnormal gains arising from a national calamity are by the Constitution made immune from public control. This is shocking doctrine. It is not only a reading of the Constitution to prevent Congress from waging war in the manner most likely to achieve the quickest and least costly victory, it is to give constitutional protection to that which of all things is least worthy of constitutional protection. This surely is abuse of constitutional government.

⁷⁷ The difficulty of appellants' position in attempting to attack the Under Secretary's order is illustrated by the footnote on page 7 of appellants' brief. Appellants point out that "the complaint did not raise any question as to whether the amount of the alleged excessive profits was correct, neither did it seek any redetermination thereof." This would appear to be a confession that appellants are debating not the substance of the Under Secretary's order but merely its form, not facts but language, not substantial rights but technical formalities. The Constitution, however, does not prescribe rituals nor dictate record arrangements. It is addressed only to matters of substance—matters with which appellants are apparently not concerned.

It is the fashion to meet every statute based upon the war power with the cry war does not repeal the Constitution. That is true. No contrary contention has been or will be made by the Government in this case. The Constitution is the charter of government both in time of peace and in time of war, in time of national peril and in time of national safety. But the recognition of this fact does not require that the war power be entirely read out of the Constitution or that this case be approached as though Congress had no independent war power but must wage war by straining at the more conventional peacetime powers, subject to judicial correction whenever peacetime conceptions are ever so slightly infringed. This brief and the Government's case take the middle ground: that there is in the Federal Government an independent war power having limits under the Constitution appropriate to that power and that the Renegotiation Act is well within those limits.

It may well be, and it is altogether probable, that renegotiation and recapture of excessive war profits can be sustained without reference to the broad mandate of the Constitution that the Federal Government shall and must wage war in a manner that will preserve the nation. Certainly it is fair to conclude that no serious challenge of the statute is made in this case even under the most restricted peacetime conception of the Constitution. The statute comes before the court replete with provisions to protect contractors and to assure fair treatment of all aggrieved persons. It is the product of the most careful Congressional consideration. Rarely has the operation of legislation been so carefully watched, so widely discussed; rarely have hearings on the disputable points been so extensive; rarely has there been such a studious effort to establish fair administrative procedures designed to protect public and private interests alike; and rarely has there been such a high degree of administrative success. The fact that in over 97% of the renegotiations the Government and the contractors have reached agreement has an eloquence and a significance that no amount of debate about real or supposed rules of law can obscure. The Renegotiation Act is not the product of a triumphant majority bent on establishing as

law a debatable policy. It is the joint product of the Services and their supplies, the American public. It is good business and fair dealing given the stamp of Congressional approval and the force of law.

But all this, significant as it is, does not reach the heart of the matter. There is in the end a single fact from which there is no escape and around which this case and all similar cases must turn—the fact that the Renegotiation Act was a war measure of first importance to victory. Congress concluded, as it could not avoid concluding, that success in war requires the elimination of war profiteering and that this must be done without impeding the rapid procurement of supplies, equipment, and weapons. This renegotiation has accomplished; every proposed substitute has been proved a failure.

Respectfully submitted.

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No. 11137

United States
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For the Ninth Circuit.

R. J. REYNOLDS TOBACCO COMPANY,
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RICHARD ARLEN NEWBY and PATTY
ANN NEWBY, both minors, by their guardian
ad litem, George H. Newby,

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NAMES AND ADDRESSES OF ATTORNEYS
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Pocatello, Idaho,

Attorneys for Appellees. [2*]

In the District Court of the Fifth Judicial District
of the State of Idaho, in and for the County of
Bear Lake

Transcript on Removal

No. 1196

[Filed in U. S. District Court Nov. 9, 1942]

GEORGE H. NEWBY, in his own behalf; RICH-
ARD ARLEN NEWBY, and PATTY ANN
NEWBY, both minors, by their Guardian Ad
Litem, GEORGE H. NEWBY,

Plaintiffs,

vs.

R. J. REYNOLDS TOBACCO COMPANY, L. R.
DONNELLY and RULON D. HAIR,

Defendants.

COMPLAINT

Comes now the plaintiffs and for a cause of action
against the defendants, complain and allege:

I.

That George H. Newby is a widower, the sur-
viving husband of Avenell Newby, and the father
of Richard Arlen Newby and Patty Ann Newby,
the children of Avenell Newby, deceased, and the
plaintiff. That said Richard Arlen Newby is a
minor of the age of approximately eight years, and
Patty Ann Newby is a minor of the age of ap-
proximately six years and that George H. Newby
was, on the 28th day of September, 1942, by order

of the above entitled court, duly made and entered, duly and regularly appointed guardian ad litem for said Richard Arlen Newby and Patty Ann [3] Newby with authority to institute, maintain, and conclude this suit. That the said George H. Newby, Richard Arlen Newby and Patty Ann Newby, minors, are the sole and only heirs at law of the said Avenell Newby, deceased.

II.

That the R. J. Reynolds Tobacco Company, one of the defendants herein is a corporation organized and existing under and by virtue of the laws of the State of North Carolina and doing business in the State of Idaho, as a foreign corporation.

III.

That at all times hereinafter mentioned the defendant L. R. Donnelly was a citizen and resident of the State of Utah with his place of business and residence in Salt Lake City, State of Utah.

IV.

That at all times hereinafter mentioned the defendant, Rulon D. Hair was a citizen and resident of the State of Idaho with his residence and place of business in the City of Pocatello, Bannock County, Idaho.

V.

That the defendant, Rulon D. Hair, at all times hereinafter mentioned was the duly authorized agent, servant, and employee of the defendant, R. J.

Reynolds Tobacco Company and Defendant, L. R. Donnelly, and was at all times hereinafter mentioned engaged in the course, scope, and line of his business for the above mentioned defendants, [4] R. J. Reynolds Tobacco Company and L. R. Donnelly.

VI.

That at all times hereinafter mentioned the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, furnished the defendant Rulon D. Hair, a Chevrolet Panel Truck, bearing State of Idaho, truck license 3A-150 and was used by said Hair in the prosecution of the business of said defendants tobacco company and Donnelly in the line, course, and scope of the employment of said Hair as an employee of said defendant Donnelly and said tobacco company.

VII.

That on the 11th day of September, 1942, at about 4:30 P. M., the deceased, Avenell Newby, was riding as a guest of the defendants in the above described Chevrolet Panel Truck, which at said time and place was being driven and operated by the defendant Rulon D. Hair, while acting within the line, course and scope of his employment as agent, servant or employee of the defendant Donnelly and defendant tobacco company, in a southerly direction on U. S. Highway 30 North at a point about 17 miles North of Montpelier, Idaho; that the said defendant Hair at said time and place negligently,

carelessly, and recklessly and in complete disregard of the rights of others and particularly of the deceased, Avenell Newby, drove said automobile on said highway at an excessive, unreasonable, and dangerous rate of speed, to-wit: 65 miles per [5] hour, while being warned by the deceased not to drive so fast, and then and there swerved back and forth across the road several times and ran off the East side of the road and tipped over, and inflicted divers and serious injuries upon plaintiffs deceased wife, Avenell Newby, from which she died on the 16th day of September, 1942.

VIII.

That by reason of the injuries received by the said deceased, Avenell Newby, at the time and place above mentioned, she was cut, mangled, torn, bruised, lacerated and injured internally to such an extent that as a direct result thereof she died on September 16th, 1942 about five days after said accident.

IX.

That at said time and place the defendant Rulon D. Hair was negligent, careless, and heedless directly, and the defendants Donnelly and Tobacco Company were negligent, careless and heedless through and by said Hair, as their agent, servant, or employee while acting within the line, course and scope of his employment, in the following particulars:

In driving said truck along said highway at an

unreasonable, excessive, dangerous, and unlawful rate of speed, to-wit: 65 miles per hour, in violation of the law of the State of Idaho. In not heeding deceased's warning to not drive so fast; in swerving back and forth across the highway several time; in running off the highway; in not [6] having said truck under such control as to be able to stop and avoid running off the highway and mortally injuring the plaintiff's deceased wife, Avenell Newby.

X.

That one, more, or all of the aforesaid acts of negligence proximately caused the accident and injuries from which plaintiff's wife, Avenell Newby, died.

XI.

That at the time of the above mentioned accident there was in full force and effect in the State of Idaho a statute, 48-504 (8) of the Idaho Code Annotated, (1932) which provides a speed limit of 35 miles per hour on highways and makes it unlawful to exceed this speed limit.

XII.

That the said Avenell Newby was of the age of 28 years; a strong, healthy woman, capable of making a home and doing the housework for the plaintiff George Newby and their minor children, Richard Arlen Newby and Patty Ann Newby, had she lived. That she was a kind and friendly person

and was devoted to her family. That the minor children were dependent upon her for their care and guidance. That by reason of her death her husband, George H. Newby, has lost the love, comfort, and companionship of a devoted wife. That the minor children, Richard Arlen Newby and Patty Ann Newby, have lost the love, comfort, and care and [7] companionship that only their mother could give to the damage of the said George H. Newby and Richard Arlen Newby and Patty Ann Newby in the sum of \$100,000.00. That by reason of the injuries resulting in the death of the deceased, Avenell Newby, expenses were incurred for medical services in the amount of \$115.00 and for funeral and burial services in the amount of \$268.20.

Wherefore, the plaintiff, George H. Newby on his own behalf and as guardian ad litem for Richard Arlen Newby and Patty Ann Newby, prays for damages against the defendants and each of them for the amount of One Hundred Thousand Dollars general damages, and \$115.00 for medical services and \$268.20 funeral and burial expenses; for their costs of suit herein expended and for such other and further relief as may be found just and equitable in the premises.

GLENN A. COUGHLAN,
Attorney for Plaintiffs.

Residence and Post Office Address: Montpelier,
Idaho.

(Duly Verified.)

[Endorsed]: Filed September 29, 1942. [8]

[Title of Court and Cause in State Court.]

PETITION FOR AN ORDER APPOINTING
GUARDIAN AD LITEM OF RICHARD
ARLEN NEWBY AND PATTY ANN
NEWBY, BOTH MINORS.

Your petitioner respectfully represents:

I.

That Richard Arlen Newby is a minor of the age of approximately eight years, and that Patty Ann Newby is a minor of approximately six years, children of George H. Newby, petitioner herein.

II.

That in the 16th day of September, 1942, Avenell Newby, the mother of Richard Arlen Newby and Patty Ann Newby was killed while riding as a guest of Rulon D. Hair, while he was in the line, course, and scope of his employment for L. R. Donnelly and the R. J. Reynolds Tobacco Company, in an automobile operated and driven by the said Rulon D. Hair.

III.

That your petitioner believes and therefore alleges that said Richard Arlen Newby and Patty Ann Newby have a good cause of action against the R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair.

Wherefore, your petitioner prays that the court enter an order appointing your petitioner as guardian ad litem of the said Richard Arlen

Newby and [9] Patty Ann Newby for the purpose of instituting and maintaining a suit for damages against the said Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair.

GEORGE H. NEWBY,
Petitioner.

(Duly verified.)

[Endorsed]: Filed Sept. 29, 1942.

[Title of Court and Cause in State Court.]

ORDER APPOINTING GUARDIAN
AD LITEM

Upon reading and filing the petition of George H. Newby filed herein, wherein it is prayed that George H. Newby be appointed guardian ad litem for Richard Arlen Newby and Patty Ann Newby, minors; and it appearing to the undersigned Judge of the above entitled Court that George H. Newby is a competent and responsible person, and that it is expedient that he be appointed to represent said minors for the purpose of instituting, maintaining and concluding a suit against R. J. Reynolds Tobacco Company, a corporation, L. R. Donnelly and Rulon D. Hair, as outlined in said petition;

Now, Therefore, It Is Ordered that the said George H. Newby be and he is hereby appointed guardian ad litem for the said Richard Arlen Newby and Patty Ann Newby, and it is further ordered

that said George H. Newby as such guardian ad litem be and he is hereby authorized and [10] directed to institute, prosecute and conclude said action referred to in said petition on behalf of said Richard Arlen Newby and Patty Ann Newby, minors.

Dated this 28th day of September, 1942.

ISAAC McDOUGALL,

District Judge.

[Endorsed]: Filed Sept. 28, 1942.

[Title of Court and Cause in State Court.]

ORDER FOR REMOVAL

This cause coming on regularly for hearing upon petition and bond of the defendants R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, herein, for an order transferring this cause to the United States District Court for the District of Idaho, Eastern Division; and

It Appearing to the Court that said defendants R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair have filed their petition herein for such removal in due form of law, and that they have also filed their bond duly conditioned with good and sufficient surety, as provided by law, and that said defendants have given plaintiffs due and regular notice thereof; and that all of said papers were duly filed before the time for said defendants to appear had expired, and

It Further Appearing to the Court that this is a proper cause for removal to the United States [11] District Court for the District of Idaho, Eastern Division;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that said petition and bond be, and the same are hereby accepted and approved, and that the above entitled cause be, and the same is hereby removed to the United States District Court for the District of Idaho, Eastern Division, and that all further proceedings in this court be stayed and the clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bear Lake County, is hereby directed to make up the record in said cause and submit the same to the United States District Court for the District of Idaho, Eastern Division, on or before thirty days from the date of the filing of said petition.

Dated this 26th day of October, 1942.

ISAAC McDOUGALL

District Judge.

[Endorsed]: Filed Oct. 26, 1942.

[Title of Court and Cause.]

MOTION TO DISMISS AND TO MAKE MORE
DEFINITE AND CERTAIN

Come Now, The defendants, Reynolds Tobacco Company and L. R. Donnelly, and each of them, and move the court to dismiss the above entitled action upon the ground that the complaint fails to

[12] state a claim upon which relief can be granted against them, or either of them.

Said defendants, and each of them, further move the court that if said motion to dismiss be not granted them, then and in that event the plaintiffs be required to make a more definite statement of the alleged negligence of the defendant, Rulon D. Hair; also the manner in which it will be contended said Rulon D. Hair recklessly drove said automobile upon the highway, and of what said alleged reckless conduct actually consisted, and what it will be contended he did, which constituted reckless disregard of the rights of the deceased.

Dated November 14, 1942.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly.

(Affidavit of Service Attached.)

[Endorsed]: Filed Nov. 14, 1942. [13]

[Title of Court and Cause.]

MOTION TO DISMISS AND MAKE MORE
DEFINITE AND CERTAIN

Comes now the defendant Rulon D. Hair, and moves the Court to dismiss the above entitled action upon the grounds that the complaint fails to state a

claim against this defendant upon which relief can be granted against him.

Said defendant further moves the court that if said Motion to Dismiss be not granted, then, and in that event, said defendant moves that the plaintiffs be required to make a more definite statement of the alleged negligence of the defendant and the manner in which it will be contended that the defendant Rulon D. Hair recklessly drove said automobile upon the highway and of what said reckless conduct actually consisted and that which it will be contended he did which constituted disregard of the rights of the deceased.

Dated this 14th day of November, 1942.

ROY L. BLACK &

JOHN R. BLACK

Attorneys for Defendant

Rulon D. Hair

Residing at Pocatello, Idaho.

(Affidavit of Mailing Attached.)

[Endorsed]: Filed Nov. 16, 1942. [14]

[Title of Court and Cause.]

MINUTES OF THE COURT

February 6, 1943

This cause came on for hearing on motions to dismiss and motion for a more definite statement in the complaint. Glenn A. Coughlin, Esquire, appeared for the plaintiffs and Messrs. E. B. Smith and A. L. Merrill, Esquires, appeared for the de-

fendant Reynolds Tobacco Company and R. L. Donnelly. On agreement between counsel for the plaintiff and attorneys for the defendant Rulon D. Hair, the motions of defendant Hair were submitted to the Court upon the argument presented by counsel for the other defendants.

After hearing argument of counsel, it was ordered that the motions to dismiss and to make more definite and certain by the defendants R. J. Reynolds Tobacco Co. and Rulon D. Hair, and each of them, is denied. Exceptions were allowed to each of the defendants and twenty-five days were granted for filing of answer to complaint.

[Title of Court and Cause.]

ORDER ON MOTIONS

The motions of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and of the defendant Rulon D. Hair to dismiss and to make more definite and certain were argued before the Court the 6th day of February, 1943 at Boise, [15] Idaho, pursuant to agreement of counsel for the respective parties to this cause. Mr. Glenn A. Coughlan appeared for the plaintiff and Messrs. E. B. Smith and A. L. Merrill appeared for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly. Pursuant to agreement between the attorney for the plaintiffs and the attorneys for the defendant Rulon D. Hair, the motions of Rulon D. Hair were submitted to the Court upon argument

of counsel for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly.

After hearing argument of the respective counsel on the motions, and the Court having duly considered the same and being fully advised in the premises;

It Is Hereby Ordered And This Does Order, That the motions to dismiss and to make more definite and certain of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and of the defendant Rulon D. Hair are, and each of them hereby is, denied.

Exceptions to the ruling of the Court are hereby granted to each and all of the defendants. Upon stipulation of counsel for the respective parties in open court it is hereby furthered ordered that the defendants and each of them be, and they are hereby granted twenty-five days from date hereof within which to prepare, serve and file their respective answers in this cause. [16]

Dated this 6th day of February, 1943.

LLOYD L. BLACK,

United States District Judge.

Presented by Glenn A. Coughlan, Counsel for plaintiffs.

GLENN A. COUGHLAN,

Attorney for Plaintiffs.

O.K. as to form

A. L. MERRILL

E. B. SMITH

[Endorsed]: Filed Feb. 6, 1943.

[Title of Court and Cause.]

DEMAND FOR JURY TRIAL

To R. J. Reynolds Tobacco Company, R. J. Donnelly, and Rulon D. Hair, and Their Attorneys, E. B. Smith, A. L. Merrill of Merrill & Merrill and Roy L. Black of Black & Black:

Demand is hereby made by the plaintiffs in the above entitled cause for jury trial in the above entitled cause. Dated February 15, 1943.

GLENN A. CAUGHLAN,
Attorney for Plaintiff
Montpelier, Idaho.

[Service Acknowledged]

[Endorsed]: Filed Feb. 25, 1943. (17)

[Title of Court and Cause.]

MINUTES OF THE COURT

March 26, 1943

The plaintiffs' motion for leave to amend the complaint herein came on for hearing before the [18] Court. Counsel for the respective parties being present.

After hearing argument of B. W. Davis, Esquire, on the part of the plaintiff and A. L. Merril, Esquire, on the part of the defendants, the Court took the motion under advisement.

[Title of Court and Cause.]

MINUTES OF THE COURT

March 27, 1943

The Court announced his conclusions on the plaintiffs' petition to amend the complaint, and leave was granted to the plaintiff to make such amendment. The defendants asked and were granted exceptions.

The defendants were granted twenty days in which to answer the complaint as amended.

It was ordered that the setting of trial of the same be, and the same hereby is vacated, and the case is continued for the term.

[Title of Court and Cause.]

MINUTES OF THE COURT

March 30, 1943

The plaintiffs' notice of submitting proposed order, filed March 29th, 1943, was withdrawn by B. W. Davis, Esquire. [19]

[Title of Court and Cause.]

MOTION

Comes now the plaintiffs by and through their attorneys of record, and move the Court for an order permitting the filing of an amended complaint herein.

That said proposed amended complaint is attached hereto.

GLENN A. COUGHLAN
Res. & P. O. Address,
Montpelier, Idaho

B. W. DAVIS
Res. & P. O. Address,
Pocatello, Idaho.
Attorneys for Plaintiffs.

[Endorsed]: Filed April 5, 1943. [20]

[Title of Court and Cause.]

MINUTES OF THE COURT

April 9, 1943

The plaintiffs' motion for leave to file an amended complaint was presented to the Court, together with the objections filed. It was ordered that the motion be, and the same hereby is granted and proposed amended complaint submitted with the motion be filed. The defendants were granted twenty days in which to plead. [21]

[Title of Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiffs and for a cause of action against the defendants, complain and allege:

I.

That George H. Newby is a widower, the surviving husband of Avenell Newby, and the father of Richard Arlen Newby, age eight years and Patty Ann Newby, age six years, the minor children of Avenell Newby, deceased and the plaintiff; that he was, on the 28th day of September, 1942, by order of the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bear Lake, duly made and entered, duly and regularly appointed guardian ad litem for said Richard Arlen Newby, and Patty Ann Newby, with authority to institute, maintain and conclude this suit. That the said George H. Newby, Richard Arlen Newby and Patty Ann Newby, minors, are the sole and only heirs at law of the said Avenell Newby, deceased.

II.

That the R. J. Reynolds Tobacco Company for several years immediately prior to the filing of this complaint, has been and now is a corporation organized and existing under the laws of the State of North Carolina and doing business in the State of Idaho as a foreign corporation without having [22] complied with the laws of Idaho relating to foreign corporations qualifying to do business in said State.

III.

That at all times hereinafter mentioned the defendant, L. R. Donnelly, was a citizen and resident of the State of Utah with his place of business and residence in Salt Lake City, State of Utah.

IV.

That on the 11th day of September, 1942 and at the time of the filing of plaintiffs' complaint in the District Court of the County of Bear Lake, Idaho, on or about the 28th day of September, 1943, the defendant, Rulon D. Hair was a citizen and a resident of the State of Idaho.

V.

That the defendant, Rulon D. Hair, at all times hereinafter mentioned was the duly authorized agent, servant and employee of the defendant, R. J. Reynolds Tobacco Company, and the defendant, L. R. Donnelly and was at all times hereinafter mentioned engaged in the course, scope and line of his business for the above mentioned defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly.

VI.

That at all times hereinafter mentioned the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were the owners of and furnished to the defendant, Rulon D. Hair, a Chevrolet Panel [23] Truck, bearing State of Idaho truck license 3A-150, which was used by said Hair in the prosecution of the business of said defendants in the line, course, and scope of the employment of said Hair as an employee of said defendants.

VII.

That at all times herein mentioned the said defendant, Rulon D. Hair had permission and authority from the said R. J. Reynolds Tobacco Company

and L. R. Donnelly, to use and operate said Chevrolet Panel truck upon the public highways of the State of Idaho, notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instruction.

VIII.

That on the 11th day of September, 1942, on the public highway known as U. S. Highway No. 30 North, at a point on said highway about seventeen miles north of Montpelier, Idaho, the said Rulon D. Hair, with a reckless disregard of the rights of others and of Avenell Newby, so recklessly drove and operated the said panel truck hereinabove referred to that the same ran off the said highway, tipped over and inflicted serious injuries upon said Avenell Newby from which she died on the 16th day of September, 1942, and at said time and place said Avenell Newby was riding with Rulon D. Hair as his guest and was a guest of the defendants herein. [24]

IX.

That the said Avenell Newby was of the age of twenty-eight years; was a strong, healthy women, capable of making a home and doing the housework for the plaintiff, George H. Newby and their minor children, Richard Arlen Newby and Patty Ann Newby, had she lived. That she was a kind and friendly person and was devoted to her family. That the minor children were dependent upon her

for their care and guidance. That by reason of her death, her husband, George H. Newby, has lost the love, comfort and companionship of a devoted wife. That the minor children, Richard Arlen Newby and Patty Ann Newby have lost the love, comfort and care and companionship that only their mother could give, to the damage of the said George H. Newby and Richard Arlen Newby and Patty Ann Newby, in the sum of \$100,000. That by reason of the injuries resulting in the death of the deceased, Avenell Newby, expenses were incurred for medical services in the amount of \$115.00, and for funeral and burial services in the amount of \$268.20.

Wherefore, the plaintiff, George H. Newby on his own behalf and as guardaian ad litem for Richard Arlen Newby and Patty Ann Newby, prays for damages against the defendants and each of them for the amount of One Hundred Thousand Dollars general damages, and \$115.00 for medical services and \$268.20 funeral and burial expenses; for their costs of suit herein expended and for such other and [25] further relief as may be found just and equitable in the premises.

GLENN A. COUGHLAN

Res. & P. O. Address: Montpelier, Idaho

B. W. DAVIS

Res. & P. O. Address: Pocatello, Idaho

Attorneys for Plaintiffs.

[Endorsed]: Filed April 9, 1943.

[Title of Court and Cause.]

MOTION TO DISMISS, MOTION FOR MORE
DEFINITE STATEMENT, AND MOTION
TO STRIKE DIRECTED TO AMENDED
COMPLAINT

Come now defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, and each of them, and moves the court as follows:

1. To dismiss the action because the amended complaint fails to state a claim against these defendants or either of them upon which relief can be granted;

2. To dismiss the action because the amended complaint shows upon its face lack of jurisdiction of the court over the persons of Richard Arlen Newby, and Patty Ann Newby, minors, and each of them, because (a) there is no general guardian who appears for or on behalf of either of said minors, (b) [26] there is no guardian ad litem appointed pursuant to Rule 9 and 58 of the Rules of the Practice of the United States District Court for the District of Idaho, and George H. Newby, who purports to appear as guardian ad litem for said minors is not qualified, pursuant to the rules aforesaid, to act in such capacity.

3. Without waiving the foregoing motions, but expressly relying thereon, these defendants and each of them, further moves the court to require plaintiffs to make a more definite statement of their purported cause of action as follows:

(a) State what relationship plaintiffs will con-

tend existed between R. J. Reynolds Tobacco Company and L. R. Donnelly and the manner in which and the reason for Rulon D. Hair acting as agent of both of said defendants at the times and in the manner alleged in Paragraph V of said amended complaint, and more particularly what type of service it will be contended said Rulon D. Hair was rendering that would enable him to act within the course, scope and line of business or claimed agency of said defendants, either jointly or severally, at the times mentioned in said amended complaint;

(b) State what particular acts referred to in Paragraph VII of said amended complaint which it is inferred were committed by Rulon D. Hair and the times of their commission and the character thereof, and which plaintiffs contend came to the knowledge of R. J. Reynolds Tobacco Company and L. R. Donnelly by virtue whereof plaintiffs claim these defendants, and each of them, knew that Hair [27] was a careless, reckless and incompetent driver of an automobile; also the particular "instructions" which it is alleged were violated in the charge that Rulon D. Hair was in the habit of hauling guests;

(c) State the particular acts which plaintiffs will contend constituted a reckless disregard of the rights of others and of Avenell Newby, and the acts which plaintiffs will contend constituted reckless driving and operation of said panel truck as alleged, and at the time alleged, in Paragraph VIII of said complaint.

4. Upon the ground that the same is immaterial, these defendants move to strike from said amended complaint the following:

(a) All that portion of Paragraph numbered II reading as follows:

“and doing business in the state of Idaho as a foreign corporation without having complied with the laws of Idaho relating to foreign corporations qualified to do business in said state.”

(b) All that portion of Paragraph numbered VII reading as follows:

“Notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions.”

These motions are made individually and separately but consolidated pursuant to Rule 12 (g)

Wherefore, defendants pray said motions and each of them be granted and said defendants be given the relief sought thereby.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendants R.

J. Reynolds Tobacco Company and L. R. Donnelly

(Service Acknowledged)

[Endorsed]: Filed April 26, 1943. [29]

[Title of Court and Cause.]

ORDER

On April 26, 1943, defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, filed their motion to dismiss; motion for more definite statement and motion to strike, directed to the amended complaint.

The matter was fully presented by briefs, filed by respective counsel, and the Court being advised, it is Ordered that:

The motion to dismiss is denied.

The motion for more definite statement is denied.

The motion to strike is sustained as to the following portion of paragraph II of the amended complaint: "without having complied with the laws of Idaho relating to foreign corporations qualified to [30] do business in said state." As to all other portions the motion is denied.

Dated this 6th day of July 1943.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed July 6, 1943.

[Title of Court and Cause].

ANSWER OF R. J. REYNOLDS TOBACCO
COMPANY and L. R. DONNELLY TO
AMENDED COMPLAINT.

Come now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the defendants in the [31] above-entitled cause, and, for answer to the complaint of the plaintiffs on file herein, admit, deny and allege as follows:

FIRST DEFENSE

That the amended complaint fails to state a claim against these answering defendants, or either of them, upon which relief can be granted.

SECOND DEFENSE

I.

These defendants deny each and every allegation of said amended complaint not hereinafter specifically admitted.

II.

Answering paragraph numbered I of said amended complaint, these defendants admit the allegations contained therein, save and except defendants deny that George H. Newby was duly and regularly appointed guardian ad litem for Richard Arlen Newby and Patty Ann Newby, and denies the legal effect alleged of the order pleaded in said paragraph.

III.

Answering paragraph numbered II of said amended complaint, these defendants admit that

the R. J. Reynolds Tobacco Company for several years immediately prior to the filing of said complaint has been, and that it now is, a corporation organized and existing under the laws of the State of North Carolina, but deny the remaining allegations of said paragraph. [32]

IV.

These defendants admit the allegations contained in paragraph numbered III of said amended complaint.

V.

Answering paragraph numbered IV of said amended complaint, these defendants deny the allegations contained therein, and allege in this respect that on the date of the filing of the original complaint in the District Court of Bear Lake County, State of Idaho, to wit: on or about the 28th day of September, 1942, the defendant Rulon D. Hair was, and for some time prior thereto had been, and now is, a bona fide resident and citizen of the State of Utah.

VI.

Answering paragraph numbered V of said amended complaint, these defendants deny each and every allegation contained therein. Further answering said paragraph, defendants allege that the said Rulon D. Hair had been acting as a salesman for the R. J. Reynolds Tobacco Company prior to the 11th day of September, 1942, but was not so acting on said date and was not acting as an agent, servant or employee of these defendants or either of them,

or in any other capacity, with reference to any of the matters or things alleged in said amended complaint, and none of said alleged acts were committed by the said Rulon D. Hair within the course, scope or line of any agency, business or employment by or for the R. J. Reynolds Tobacco Company or L. R. Donnelly, and for which acts, if any were committed, [33] neither the said R. J. Reynolds Tobacco Company or the said L. R. Donnelly are in anywise liable.

VII.

Answering paragraph numbered VI of said amended complaint, these defendants deny each and every allegation contained therein. Further answering said paragraph, however, defendants allege that the Chevrolet Panel Truck therein described was the property of R. J. Reynolds Tobacco Company, but that it was not used by the said Rulon D. Hair at the time of the matters and things alleged in said complaint in the prosecution of any business or agency of these answering defendants or either of them, or as agent, servant or employee of either of said defendants, and its use at such time and for the purposes alleged in said complaint was without right or permission of these answering defendants, and they are in no wise responsible for any damages, if any occurred, as the result thereof.

VIII.

Answering paragraph numbered VII of said amended complaint, these defendants admit that Rulon D. Hair had permission and authority to use

and operate said Chevrolet Panel Truck when actually engaged in the business of the company, but deny that he was so engaged on the 11th day of September, 1942, and deny that these defendants, or either of them, knew that the said Rulon D. Hair was a careless, reckless or incompetent driver of an automobile or that he was in the habit of hauling [34] guests in said car. In this respect defendants further deny that the said Rulon D. Hair was a careless, reckless or incompetent driver of an automobile, and deny that he hauled guests therein. These defendants allege that the said Rulon D. Hair had been given instructions not to haul or carry guests in said automobile or panel truck, and further allege that if there has been an infraction of this instruction, the same was without the knowledge or consent of these answering defendants or either of them. Defendants deny each and every other allegation contained in said paragraph.

IX.

Answering paragraph numbered VIII of said amended complaint, these defendants admit that on the 11th day of September, 1942 on a public highway, known as U. S. Highway #30 North, at a point on said highway about 17 miles north of Montpelier, Idaho, the defendant Rulon D. Hair, while driving said Panel Truck, ran off the highway, tipped over, and that certain injuries were inflicted upon Avanell Newby, and admits that Avanell Newby died on the 16th day of September, 1942, but deny each and every other allegation contained in

said paragraph. Further answering said paragraph, these defendants allege that if the said AvaneU Newby was riding in said Panel Truck as the guest of Rulon D. Hair or with his consent, the same was without the consent or permission of these answering defendants or either of them, and contrary to positive instructions theretofore given the said Rulon [35] D. Hair, and if the said Rulon D. Hair transported the said AvaneU Newby in said Panel Truck as a guest or otherwise, the same was without authority of these defendants, and without the scope of his employment, and for the consequence of which neither of these answering defendants are liable.

X.

Answering paragraph numbered IX of said amended complaint, these defendants admit that AvaneU Newby was of the approximate age of 28 years. Defendants deny that by reason of her death the plaintiffs have been damaged in any sum or amount whatever, by reason of any act or omission on the part of these defendants or either of them. Defendants are without knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph, and upon this ground deny each and every other allegation contained therein.

THIRD DEFENSE

Further answering said amended complaint, and as an additional defense thereto, these defendants allege that any injuries which the said AvaneU Newby may have received in the accident described

in the amended complaint and the damages to the plaintiffs, if any, resulting therefrom were proximately caused or contributed to by the negligence and carelessness of the said Avaneil Newby, who was then and there guilty of contributory negligence and said injuries were not the result of negligence or want of care on the part of any of the defendants charged in said amended complaint. [36]

FOURTH DEFENSE

Further answering said amended complaint, and as a separate and further affirmative defense thereto, these defendants allege that at the time and place mentioned in said amended complaint the said Avaneil Newby was, and for some time prior thereto had been, riding in said panel truck as a gratuitous guest of Rulon D. Hair and at her special request; that she had been with the said Rulon D. Hair for a number of hours prior to said accident and all matters and things touching said association and the operation of said panel truck by the said Rulon D. Hair were fully known to her and freely acquiesced in by her, and having such information she continued to ride in said panel truck and acquiesced in each and everything done with respect thereto, and of said association, and the driving of said panel truck, and with such knowledge and acquiescence on her part and the riding in said truck with the said Rulon D. Hair at her own request and as his gratuitous guest she thereby assumed all risk attendant thereon and by reason of her acquiescence and of her own conduct no recovery can be had for

any damages, if any, which may have resulted from the accident alleged in said amended complaint.

FIFTH DEFENSE

Further answering said amended complaint and as a separate and further affirmative defense thereto, these defendants allege that the injuries which Avaneil Newby may have sustained, and the [37] damages thereby suffered, if any, by the plaintiffs were the result of matters and things over which the driver of said automobile had no control, and said accident occurred without fault on his part and without fault, liability or responsibility of any kind whatever on the part of these answering defendants.

Wherefore, these defendants pray that plaintiffs take nothing by reason thereof, and that defendants recover their costs incurred herein.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for R. J. Reynolds
Tobacco Company
and L. R. Donnelly

(Duly verified.)

The defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, hereby demand a trial by jury.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendants R.
J. Reynolds Tobacco Com-
pany and L. R. Donnelly

(Service Acknowledged.)

[Endorsed]: Filed July 15, 1943. [38]

[Title of Court and Cause].

ANSWER OF DEFENDANT RULON D. HAIR

Comes now the defendant Rulon D. Hair and for answer to plaintiffs' Amended complaint this defendant admits, denies and alleges as follows:

I

That said amended complaint fails to state a claim or cause of action against this answering defendant upon which relief can be granted to plaintiffs or either or any of them.

SECOND DEFENSE

I

This defendant denies each and every allegation of said complaint not herein specifically admitted.

II

Answering paragraph I of the Amended Complaint this defendant admits the allegations thereof.

III

Answering paragraph II of the amended complaint this defendant admits that defendant R. J. Reynolds Tobacco Company, for several years immediately prior to the filing of this amended complaint, has been and now is a corporation but denies each and every other allegation of said paragraph II.

IV

Answering paragraph III of the amended complaint this defendant admits the allegations thereof. [39]

V

Answering paragraph IV of said amended complaint this defendant denies each and every allegation thereof and further answering said paragraph IV of said amended complaint this defendant alleges the fact to be that at the time of the filing of the complaint herein this defendant was and ever since said time has been and now is a citizen of and a resident of the State of Utah.

VI

Answering paragraph V of said amended complaint this defendant admits that prior to the accident mentioned in the complaint he had been an employee of the said defendant R. J. Reynolds To-

bacco Company, a corporation, as a salesman, and this defendant denies each and every other allegation of said paragraph.

VII

Answering paragraph VI of said amended complaint this defendant admits that at the times mentioned in the amended complaint defendant R. J. Reynolds Tobacco Company furnished to this defendant a Chevrolet Panel Truck, bearing State of Idaho Truck License #3A-150 which was used by this defendant in the prosecution of his business and in his capacity as employee and salesman for said defendant R. J. Reynolds Tobacco Company and defendant denies each and every other allegations of said paragraph VI. [40]

VIII

Answering paragraph VII of said complaint this defendants admits that at the times herein mentioned he had permission and authority from the defendant R. J. Reynolds Tobacco Company to use and operate said Chevrolet Panel Truck upon the public highways of the State of Idaho in the carrying on of his business as employee and salesman for said defendant R. J. Reynolds Tobacco Company and this defendant denies that this defendant was a careless, or that he was a reckless or that he was an incompetent driver of an automobile and denies each and every other allegation of said paragraph.

IX

Answering paragraph VIII of said amended complaint this defendant admits that on to-wit: The 11th day of September, 1942, on the public highway known as U. S. Highway #30 N at a point about seventeen miles north of Montpelier, Idaho, the said truck, ran off the said highway, tipped over and inflicted injuries upon said Avanell Newby and that at said time and place said Avanell Newby was riding with this defendant but denies each and every other allegation of said paragraph.

Further answering said allegations defendant alleges that said Avanell Newby was riding in said truck with said defendant at her own request and instance and without any invitation from this defendant and said Avanell Newby having requested the defendant to permit her to ride with him to Montpelier, Idaho and that she was so riding with [41] the defendant at the time of the said accident alleged in the amended complaint.

X

Answering paragraph IX of said amended complaint this defendant admits that the said Avanell Newby was of about the age of 28 years; denies each and every other allegation of said paragraph IX; this defendant specifically denies that said George H. Newby, Richard Arlen Newby and Patty Ann Newby have been damaged in any sum or amount whatever by reason of any act or omission on the part of this defendant.

THIRD DEFENSE

Further answering said Amended Complaint and as an additional defense thereto this defendant alleges:

I

That any injuries which the said Avaneil Newby may have received in the accident described in the Amended Complaint and the damages to plaintiffs, if any, resulting therefrom, were proximately caused or contributed to by the negligence of said Avaneil Newby who was then and there guilty of contributory negligence and that the said injuries were not the result of negligence or want of care on the part of this defendant.

FOURTH DEFENSE

Further answering the said Amended Complaint and as a further, separate and affirmative defense thereto this defendant alleges: [42]

That at the time and place mentioned in said amended complaint the said Avaneil Newby was, and for some time prior thereto had been, riding in said automobile with this defendant as a gratuitous guest of this defendant and solely at and by her own request, and that all matters and things touching said truck and the operation of said truck or automobile by this defendant, as the same was being operated, were fully known to the said Avaneil Newby, and, having such information, she continued to ride in said automobile truck and acquiesced in and joined with this defendant in each and everything done with respect thereto, and with respect

to the driving of the said automobile as then being driven by this defendant and with such knowledge and acquiescence and her riding in said automobile truck with this defendant solely at her own request and instance and as a gratuitous guest, she thereby assumed all risk attendant thereon and by reason whereby no recovery can be had for any damages, if any, which may have resulted to her or to any of the plaintiffs from the said accident alleged in the amended complaint.

FIFTH DEFENSE

Further answering said Amended Complaint and as a further defense thereto this defendant alleges that the injuries which the said Avanell Newby may have sustained and any damages suffered by the plaintiffs herein, were the result of matters and things over which this defendant had no control and the said accident occurred without fault, without [43] carelessness and without negligence on the part of this defendant.

Wherefore, having fully answered said Amended Complaint this defendant prays that plaintiff take nothing by reason thereof and this defendant recover his costs incurred herein.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant Ru-
lon D. Hair. Residence:
Pocatello, Idaho.

Defendant Rulon D. Hair hereby demands a trial by jury.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant Rulon D. Hair, Residence: Pocatello, Idaho.

(Duly verified.)

(Service Acknowledged)

[Endorsed]: Filed July 15, 1943.

[Title of Court and Cause].

MINUTES OF THE COURT

August 18, 1943

The plaintiffs' Motion to Strike from the Answers of the several defendants and all objections to interrogatories by the respective parties came on for [44] hearing before the Court. Glenn A. Coughlan, Esquire, appeared as counsel for the plaintiffs and E. B. Smith, Esquire, appeared for all the defendants except Rulon D. Hair.

On Motion by plaintiffs' counsel and with consent of counsel for the defendants, the Court granted leave to amend the Motion to Strike by interlineation.

On stipulation of counsel the Motions as regard to the defendant Rulon D. Hair, were submitted without argument.

The Court heard argument of respective counsel on the Motion to Strike from the Answer of the defendants R. J. Reynolds Tobacco Co. and L. R. Donnelly, and also the objection to interrogatories and took the same under advisement.

The Court ordered that all interrogatories, that may be sustained by the Court, be answered by the respective parties to whom they are directed by September 15, 1943. [45]

[Title of Court and Cause].

VERDICT

We, the jury in the above entitled cause, find for the plaintiffs, and against the defendants, R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, and fix plaintiffs' damages against said defendants at the sum of \$7500.00.

MERLE A. MILLER

Foreman

[Endorsed]: Filed Oct. 23, 1943. [46]

[Title of Court and Cause.]

JUDGMENT ON VERDICT

This matter having come on regularly for trial to a jury which has returned its verdict herein.

Now, Therefore, It Is Ordered, Adjudged, and Decreed, That plaintiffs have and recover of and from the said defendants, jointly and severally, the sum of Seven Thousand Five Hundred Dollars

(\$7,500.00) damages, together with plaintiffs' costs and disbursements incurred herein assessed in the sum of \$89.40.

Witness, The Honorable Chase A. Clark, Judge of the above entitled Court, and the seal thereof, this 23rd day of October, 1943.

[Seal]

W. D. McREYNOLDS

Clerk

[Endorsed]: Filed Oct. 23, 1943. [47]

[Title of Court and Cause.]

MINUTES OF THE COURT

January 5, 1944

This cause came on for hearing at this time, upon agreement of counsel for all parties to the action, on the Motions for judgment notwithstanding verdict, and, in the alternative, for a new trial.

The defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were represented by E. B. Smith, Esquire, who made oral argument on behalf of said defendants. The defendant Rulon D. Hair appeared by letter of his counsel, Messrs. Black and Black; and the plaintiff's counsel presented the plaintiff's resistance to said motions on brief.

The Court, being fully advised in the premises, announced his conclusions, and ordered that both Motions for judgment regardless of verdict and Motion for new trial be, and the same hereby are,

denied. All defendants were granted exceptions to the Order. [48]

[Title of Court and Cause.]

NOTICE OF APPEAL BY R. J. REYNOLDS
TOBACCO COMPANY AND L. R. DON-
NELLY.

Notice Is Hereby Given That R. J. Reynolds Tobacco Company, a corporation, and L. R. Donnelly, two of the defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment made and entered in the above entitled court and cause on the 23rd day of October, 1943, which said judgment is in favor of the plaintiffs above named and against these two appealing defendants, and each of them; also against one Rulon D. Hair.

Dated this 20th day of January, 1944.

E. B. SMITH

Residence: Boise, Idaho,

A. L. MERRILL,

R. D. MERRILL,

Residing at Pocatello, Idaho,
Attorneys for said defend-
ants, R. J. Reynolds To-
bacco Company and L. R.
Donnelly.

[Endorsed]: Filed Jan. 20, 1944. [49]

[Title of Court and Cause.]

COST BOND ON APPEAL OF R. J. REYNOLDS TOBACCO COMPANY AND L. R. DONNELLY

Know All Men By These Presents:

That we, R. J. Reynolds Tobacco Company, a corporation, and L. R. Donnelly, as Principals, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound unto George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, the above named plaintiffs and appellees in the above entitled cause, in the sum of Two Hundred Fifty (\$250.00) Dollars, for which sum well and truly to be paid we bind ourselves and our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of January, 1944.

Whereas, on the 23rd day of October, 1943, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that Court wherein George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, were plaintiffs, and R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon [50] D.

Hair were defendants, a judgment was rendered against said defendants in the sum of \$7,500.00, with interest and costs, and said defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, having filed in the office of the Clerk of said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

Now, Therefore, the condition of this obligation is such, that if the said R. J. Reynolds Tobacco Company and L. R. Donnelly, the appellants, shall prosecute said appeal and pay all costs that may be rendered against them or either of them if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award against these defendants or either of them if the judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

R. J. REYNOLDS TOBACCO
COMPANY,

By E. B. SMITH,

One of its attorneys of record,
Residing at Boise, Idaho,

L. R. DONNELLY,

By E. B. SMITH,

One of his attorneys of record,
Residing at Boise, Idaho,

Principal. [51]

UNITED STATES FIDELITY
AND GUARANTY COMPANY

By HENRY WHITSON,
Its attorney in fact,
Surety.

[Seal] HENRY WHITSON,
Resident Agent,
Residing at Boise, Idaho.

[Endorsed]: Filed Jan. 20, 1944. [52]

MANDATE

Filed Dec. 11, 1944

United States of America—ss:

The President of the United States of America

To the Honorable the Judges of the District Court
of the United States for the District of Idaho,
Eastern Division—Greeting:

Whereas, lately in the District Court of the United States for the District of Idaho, Eastern Division, before you, or some of you, in a cause between George H. Newby, in his own behalf; Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian Ad Litem, George H. Newby, plaintiffs, and R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, defendants No. 1196, a judgment was duly filed on the 23rd day of October, 1943, which said judgment is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and [53] as by the

inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by R. J. Reynolds Tobacco Company and L. R. Donnelly, as appellants against George H. Newby, in his own behalf, Richard Arlen Newby, and Patty Ann Newby, both minors, by their Guardian Ad Litem, George H. Newby, as appellees, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 18th day of September in the year of our Lord One Thousand, Nine Hundred and Forty-four the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and was duly submitted; [54]

On Consideration Whereof it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellants, and against the appellees, and that this cause be, and hereby is remanded to the said District Court with directions to grant a new trial.

It is further ordered and adjudged by this Court that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

(November 6, 1944).

You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause in accordance with the opinion and

judgment of this court, and as according to right and justice and the laws of the United States ought to be had, the said judgment of the said District Court notwithstanding.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, the 8th day of December, in the year of our Lord One Thousand Nine Hundred and Forty-four.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Amount of Costs Allowed and Taxed

In Favor of appellants and Against appellees, as
per Annexed Bill of Items, Taxed in Detail: \$740.12.

PAUL P. O'BRIEN

Clerk. [55]

[Title of Court and Cause]

MOTION

Comes Now, the defendants, R. J. Reynolds Tobacco Company, and L. R. Donnelly, and move the Court for an order staying all further proceedings in this cause until the costs taxed, in the amount of \$740.12, against the plaintiffs on appeal herein, in the Circuit Court of Appeals of the 9th Circuit, reversing the lower court, and taxing the plaintiffs with the costs of such appeal, are paid;

This motion is based upon the records and files

in this action and the affidavit of A. L. Merrill, filed herewith and made a part hereof.

R. J. REYNOLDS TOBACCO
COMPANY and

L. R. DONNELLY

By E. B. SMITH

Residing at Boise, Idaho

By A. L. MERRILL and

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for Defendants.

(Service Acknowledged.) [56]

[Title of Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION

State of Idaho

County of Bannock—ss.

A. L. Merrill, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendants in the above-entitled action; that the Circuit Court of Appeals for the 9th Circuit directed judgment to be entered against plaintiffs in said cause in the sum of \$740.12, as costs of said appeal; that said costs have not been paid nor has any part thereof, although demand has been made therefor upon plaintiffs; that plaintiffs do not have on file any cost bond nor other security whatever.

A. L. MERRILL

Subscribed and sworn to before me this 17th day of February, 1945.

[Seal] O. R. BAUM

Residing at Pocatello, Idaho

(Service Acknowledged.) [57]

[Endorsed]: Filed February 22, 1945.

[Title of Court and Cause]

AFFIDAVIT IN OPPOSITION TO DEFEND-
ANTS' MOTION FOR STAY OF PRO-
CEEDINGS.

State of Idaho

County of Bannock—ss.

B. W. Davis being first duly sworn upon his oath, deposes and says:

That he is the attorney for the plaintiffs in the above entitled cause; that he personally made a sworn statement which was presented to the Officer in Charge, Ship Repair Unit, Navy 128, c/o F. P. O., San Francisco California, in which statement he set out the status of the present cause and the necessity of Mr. Newby attending the trial of said cause; that said statement was made on the 8th day of January, 1945; that the matter was referred to W. H. Egan, Commander in the United States Naval Reserve, United States Navy Repair Unit, Navy 128 c/o F.P.O., San Francisco, California; that affiant was notified by Commander Egan that it would be necessary to secure a setting of the case and assurance that the matter would be disposed

of at the time set before Mr. Newby's application for emergency leave could be or would be passed upon; that thereafter, on the 23rd day of January, 1945, affiant requested of the Federal District Judge in the above entitled cause that said case be set; that on the 26th day of January, 1945, he received a letter from Honorable Chase A. Clark, Federal District Judge, advising that the case had been set for trial for the 19th day of March, 1945, a copy of said letter being mailed to Merrill and Merrill, and Mr. A. B. Smith, Attorneys for Reynolds Tobacco Company and L. R. Donnelly; that immediately thereafter and between [58] the 27th day of January, 1945 and the 5th day of February, 1945, the exact date not being known to affiant, affiant spoke to Mr. A. L. Merrill personally, advising him that the case had been set and that he was expecting Mr. Newby to secure a leave and return; that in addition thereto, on the 5th day of February, 1945, affiant wrote and mailed the following letter:

February 5, 1945

Merrill & Merrill, Attorneys,
City.

Attention: Mr. A. L. Merrill:

Re: Newby v. Hair et al.

Dear A. L.

I believe Judge Clark sent you copy of his letter to me of the 26th ult. I requested him to give us as nearly as possible the date of the setting of this case because it was necessary to make a proper

showing to Mr. Newby's commanding officer in order to secure a leave that he might attend the trial of this case.

We are planning on trying it on March 19th and I have been advised by Mr. Newby's commanding officer that he would be granted sufficient leave at that time to attend the trial.

Yours very truly,
B. W. DAVIS.

D/g

That immediately upon receipt of the notice from the Federal Court that said cause would be tried on the 19th day of March, 1945, affiant wired W. H. Egan, Commander, to that effect and immediately thereafter received the following letter:

D. S. Ship Repair Unit /js/ 5
Navy Number 128
c/o Fleet Post Office,
San Francisco, California

2 February 1945

Mr. B. W. Davis,
Attorney at Law,
Ross-Davis Bldg.,
Pocatello, Idaho

Dear Sir:

This will acknowledge your letter of 8 January 1945, regarding George Newby, MoMM2c, USNR. I am pleased to inform you that it is our intention

to allow Newby an emergency leave of thirty (30) days, commencing the latter part of February. He should therefore, be available for the trial, you mentioned in your letter, during the month of March.

I regret that it has been impossible for me to give you an answer to your question before this time, and if I can be of further assistance in this matter, please do not hesitate to write to me.

Sincerely yours,

W. H. EGAN

Commander, U. S. Naval Reserve

WHE/js [59]

That immediately thereafter and on the 7th day of February, 1945, he also wrote said W. H. Egan a letter as follows:

February 7, 1945

W. H. Egan, Commander,
U. S. Naval Reserve,
U. S. Ship Repair Unit,
Navy Number 128,
c/o Fleet Post Office,
San Francisco, Calif.

Re: George H. Newby MoMM2c USNR

Dear Mr. Egan:

Thank you kindly for your letter of the 2nd inst., with reference to Mr. Newby's emergency leave.

For your information, I am enclosing copy of

letter from our Federal District Judge. He has set this case for trial on the 19th of March. I can see no reason that would prevent the case being tried and completed the week beginning March 19th.

Yours very truly,
B. W. DAVIS.

D/g Enc.

That this affiant has prepared for the trial of said cause; has caused the witnesses that are to be called on behalf of the plaintiffs to be subpoenaed, and that he can truthfully state that Mr. Newby would not have been given an emergency leave unless the Commandant above referred to had been assured that said cause would be tried;

That no opposition on behalf of counsel for the defendant was received in this cause and no motion made until the 17th day of February, 1945.

Dated this 13th day of February, 1945.

B. W. DAVIS

Subscribed and Sworn to before me this 13th day of March, 1945.

[Seal]

LAURA S. GOUGH

Notary Public

Residing at Pocatello, Idaho.

[Endorsed]: Filed March 13, 1945 [60]

[Title of Court and Cause.]

AFFIDAVIT BY POOR PERSON TO DIS-
PENSE WITH SECURITY FOR COSTS
AND IN OPPOSITION TO THE MOTION
OF DEFENDANTS FOR STAY OF PRO-
CEEDINGS UNTIL COSTS ON APPEAL
ARE PAID.

State of Idaho

County of Bannock—ss.

George H. Newby, being first duly sworn upon his oath, deposes and says:

That he is a citizen of the United States of America; that he is one of the plaintiffs in the above entitled action, appearing on his own behalf and as Guardian Ad Litem for his two minor children; that he is entitled to commence and maintain said action in said court;

He further states the fact to be that because of his poverty, he is unable to pay the costs of said action or to give security for the same; that he and his children are the only ones holding a beneficial interest in the outcome of said action and that the nature of his cause of action is clearly and concisely set out in his complaint filed in said cause;

He further states that he is thirty-seven years of age and that he is a M.O.M.M. First Class in the United States Navy; that he has been a member of the forces of the United States Navy since on or about the 31st of December, 1943; that he does not have any funds or moneys on hand with which to pay any or all of the costs assessed against him

in the above entitled cause; that his children are both under the age of eleven years, do not have any funds of their own, and are entirely dependent upon this affiant for their support and keep; that affiant has in his possession the sum of [61] approximately One Hundred Dollars; that it is all the money or property that he has; that said amount of money is not any more than sufficient to pay his expenses of bringing his two children and his mother-in-law to Pocatello for the trial of this cause, where he must board and room them; where he must pay his own keep and when the trial is completed, he must pay his own expenses and fare to the Pacific Coast for his point of embarkation;

That prior to his entry in the United States Navy, he was a workman for the M-K Construction Company; that he does not have any friends or relatives who can or will either loan him the money to pay the costs or to go his security; that he is willing and consents that in the event of his success in the retrial of the present cause that he will allow upon any judgment or verdict rendered, a credit to the defendant for the costs taxed on appeal;

That this affiant and his counsel were required to make special application through the Fourteenth Naval District for his release from his duties for a sufficient length of time to attend the trial of the case; that they were required to advise and to show to the Commandant passing upon the matter, that it was an emergency; that the case had been set for trial, and that the matter would be defi-

nately concluded; that if this affiant had known or been advised at the time he secured his emergency leave that said cause could or would not be tried, or that he was obliged to pay the amounts of costs taxes on appeal, he could not and would not have secured leave for the reason that he had no money with which to pay said costs upon appeal;

That this affiant does not have any credit with any bank or commercial institution that will loan him money; that he does not have any security to give for a loan or for a bond; that from the first day of August, 1944 to the First Day of February, 1945, affiant received the sum of \$98.00 per month; that since the 1st day of February, 1945 his pay is \$113.00 per month; that out of his monthly pay, there is deducted the sum of \$28.50 for his children, approximately \$2.00 per month for insurance premiums, he is required [62] to buy all of his clothing and supplies of every kind; that he does not have net to him, after payment of his expenses, his share of allotment and the different items he is required to pay, in excess of \$40.00 to \$50.00 per month; that affiant has in his possession his complete Naval History and record, which he will upon request by the court, produce for inspection and examination by the court and opposing counsel;

That this affiant is willing to submit to oral and cross examination either by the court or by opposing counsel as to the truth of this affidavit;

That if this affiant is required to return to service without being able to present his case to the court and jury at this time, he will not be able to secure

another leave and must wait to retry the matter until the end of the present war; that affiant was advised by his commanding officer that the department was fearful that they would give him leave, that the case would be continued or that something would happen to prevent its trial.

Affiant further states that this affidavit is made and filed for the purpose of availing himself of the rights and privileges in such case provided by the Act of Congress, Ch. 209, Approved July 20, 1892, as Amended by Act of June 25, 1910, ch. 435, 36 Stat. L. 866;

That prior to affiant's entry in the service of the United States Navy, he was earning and receiving \$70.00 per week and that because of his service in the United States Navy, he is prevented from paying the costs assessed against him and he believes he is entitled to a stay of the collection of said costs and to relief therefrom under the Soldiers and Sailors Civil Relief Act of the United States; that he furthermore states that he is willing to submit himself to examination by the Court or to cross examination by the defendants on this matter.

GEORGE H. NEWBY

Subscribed and sworn to before me this 13th day of March, 1945.

[Seal]

LAURA S. GOUGH

Notary Public

Pocatello, Idaho.

[Endorsed]: Filed March 13, 1945. [63]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 12, 1945

This cause came on for hearing on Motion to Stay further proceedings. After oral argument by counsel for the respective parties, the Court, being fully advised in the premises, took the matter under advisement. [64]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 13, 1945

Comes now defendants' attorney, A. L. Merrill, Esquire, and moves that all further proceedings be stayed until costs taxed on appeal have been paid. The Court being fully advised, plaintiffs' attorney, B. W. Davis, Esquire, was given until 3 o'clock, P. M., to make showing as to why costs, or any part, could not be paid. B. W. Davis, Esquire, filed Affidavit in opposition to defendants' Motion for staying proceedings, also affidavits by poor persons to dispense with security for costs and in opposition to Motion.

The Court took the matter under advisement.

[Title of Court and Cause.]

MINUTES OF THE COURT

March 14, 1945

The Court, being fully advised in the premises, denied the Motion to stay further proceedings until costs in the trial be paid, with the understanding that, if any recovery was made by plaintiff, the amount of costs in former trial would be deducted from the Judgment. [65]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 19, 1945

This cause came on for trial before the Court and a jury; Messrs. B. W. Davis and Glen A. Coughlan appearing as counsel for the plaintiffs and Messrs. A. L. Merrill and E. B. Smith, appearing as counsel for the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly.

The Clerk, under the directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper to secure a jury.

Ethel Young, whose name was drawn, was excused for cause; Mrs. Roy Lewis, whose name was so drawn, was excused on plaintiffs' peremptory challenge; Virginia Russell and Mrs. Stacy Bond,

whose names were likewise drawn, were excused on defendants' peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to wit:

E. A. Lindquist, Lee Corbridge, Mrs. George Mosier, Hans C. Christiansen, Maynard Bowersox, DeLoy Brown, Earl Wolfley, J. O. Ashcraft, A. V. Edwards, Ed Owens, Thomas J. Burns, Genevieve Lindsay.

The Court directed that one juror, in addition to the panel, be called to sit as an alternate juror. Thereupon, the name of Mrs. A. H. Bush, was drawn from the jury box, and on being sworn and examined on voir dire, was found duly qualified, and was accepted by counsel for the respective parties.

The jury panel and the alternate juror were sworn to well and truly try said cause, and a true verdict render.

After admonishing the jury and the alternate juror, the Court excused them until 2:00 o'clock, P. M., in order that counsel for the respective parties might argue a point of law. [66]

Trial of the case was resumed at 2:00 o'clock P. M., and after statement of plaintiffs' cause by their counsel, B. W. Davis, Esquire, E. B. Smith, Esquire, made a statement to the jury, in behalf of the defendants.

Whereupon Dr. R. B. Lindsay and Alton Bun-

derson were sworn and examined as witnesses on the part of the plaintiff, and Exhibit No. 6 was admitted for the purpose of the witness explaining to the jury, for illustrative purpose only.

After admonishing the jury and the alternate juror, the Court excused them to 10 o'clock, A. M., on Tuesday, March 20, 1945. [67]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 20, 1945

Trial of this case was resumed before the Court and Jury. Counsel for the respective parties being present, it was agreed that the jury and alternate juror were all present.

Motion was made by A. L. Merrill to strike Exhibit 9 (plaintiffs'); which Motion was overruled.

The testimony given by Calvin Teuscher from the transcript of the previous trial was read by B. W. Davis, Esquire.

L. R. Donnelly was called for cross examination, and was sworn and cross examined.

Rulon D. Hair was sworn and examined as a witness on the part of the plaintiffs.

B. W. Davis, Esquire, read the deposition of E. A. Darr in evidence.

The Jury was excused for counsel to argue a point of law under the rules.

B. W. Davis, Esquire, continued to read the deposition of E. A. Darr.

Cross-Examination was read by E. B. Smith, Esquire, from the deposition of E. A. Darr.

L. R. Donnelly was recalled on cross-examination for further questioning.

After admonishing the jury, the Court excused them to 10 o'clock, A. M., on Wednesday, March 21, 1945, and continued the trial to that time. [68]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 21, 1945

Trial of this cause was resumed before the Court and Jury. Counsel for the respective parties being present, it was agreed that the jury and alternate juror were all present.

L. R. Donnelly was recalled and questioned further on cross-examination.

R. N. Pugmire was sworn and examined as a witness on the part of the plaintiff.

The jury was excused for counsel to argue a point of law, until 1:30 o'clock, P. M., at which time trial of the case was resumed.

Motion by B. W. Davis, Esquire, to amend the Complaint by inserting the word "drunken" in paragraph VII, line 7 on page 2; objection by A. L. Merrill, Esquire, Motion granted.

Sid Close was sworn and examined as a witness

on the part of the plaintiff. Motion to strike testimony granted.

L. R. Donnelly was recalled on cross-examination.

Ben Buskirk was sworn and examined as a witness on the part of the plaintiff. Motion to strike testimony denied.

Fred H. Smullen was sworn and examined as a witness on the part of the plaintiff, and here the plaintiff rests.

F. M. Williams was sworn and examined as a witness in behalf of the plaintiff. Testimony taken in absence of the jury, to be read to the jury on rebuttal, by oral stipulation of counsel for the respective parties.

Carl Oxenbine, Jack Perkins, and Charles Nichols were sworn and examined as witnesses on the part of the defendants.

After admonishing the jury, the Court excused them to 10:00 o'clock, A. M., on Wednesday, March 22, 1945. [69]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 22, 1945

Trial of this cause was resumed before the Court and Jury. All counsel for the respective parties being present, it was agreed that the jury and alternate juror were all present.

Rulon D. Hair, C. A. Rasmussen were sworn and

examined as witnesses on the part of the defendants; Deposition of Darwin Perkins was read in evidence by E. B. Smith, Esquire; and L. R. Donnelly was sworn and examined as witness on the part of the defendants, and here the defendants rest.

On rebuttal, George H. Newby was recalled and further examined, and the testimony of F. M. Williams was read by the Court Reporter. And here both sides close.

Whereupon, the Jury was excused to 10:00 o'clock, A. M., on Friday, March 23, 1945, after having been admonished by the Court.

A. L. Merrill, Esquire, moved the Court for a directed verdict in favor of the defendant, for the reason that Rulon D. Hair was not acting within the scope of his work. Motion denied.

Comes now the plaintiff and moves the Court to instruct the jury to return a verdict as prayed for in the prayer of the complaint. Motion denied.

Whereupon, the Court continued the trial of the case until 10:00 o'clock, A. M., on Friday, March 23, 1945. [70]

[Title of Court and Cause.]

MINUTES OF THE COURT

March 23, 1945

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury. The Court discharged the

alternate juror, and the jury panel retired in charge of Bailiffs, duly sworn, to consider of their verdict.

On the same day, the jury returned into Court, counsel for respective parties being present, whereupon, the jury presented their written verdict, which was in the words following:

[Title of Court and Cause.]

VERDICT

“We, the jury in the above entitled cause find for the plaintiff and against the defendant R. J. Reynolds Tobacco Company, and assess plaintiffs’ damages in the sum of \$30,000.00.

J. O. ASHCRAFT

Foreman”

The verdict was recorded in the presence of the jury, and then read to them, and they each confirmed the same.

Thereupon, E. B. Smith, Esquire, counsel for defendant, took exception to the verdict of the jury.

[Title of Court and Cause.]

MINUTES OF THE COURT

March 24, 1945

The Court ordered the Clerk to enter Judgment in the full amount as set forth in the Jury’s Verdict. [71]

[Title of Court and Cause.]

VERDICT

We, the Jury in the above entitled cause find for the plaintiff and against the defendant R. J. Reynolds Tobacco Company, and assess plaintiffs' damages in the sum of \$30,000.00.

J. O. ASHCROFT

Foreman.

[Endorsed]: Filed March 23, 1945. [72]

In the District Court of the United States, in and for the District of Idaho, Eastern Division

No. 1196

GEORGE H. NEWBY, in his own behalf, RICHARD ARLEN NEWBY, and PATTY ANN NEWBY, both minors, by their guardian ad litem, George H. Newby,

Plaintiffs,

vs.

R. J. REYNOLDS, TOBACCO COMPANY and L. R. DONNELLY,

Defendants.

JUDGMENT

This action came regularly on for trial, the parties appearing by their attorneys. A jury of twelve persons was regularly empaneled and sworn to try said action, and oral and documentary evi-

dence was introduced on the part of the plaintiffs and defendants. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names and presented their written verdict, as follows:

[Title of Court and Cause.]

VERDICT

“We, the Jury in the above entitled cause find for the plaintiff and against the defendant R. J. Reynolds Tobacco Company, and assess plaintiffs’ damages in the sum of \$30,000.00.

J. O. ASHCROFT,

Foreman.”

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that plaintiffs do have and recover from the defendant, R. J. Reynolds Tobacco Company, the sum of Thirty Thousand Dollars (\$30,000.00), with interest thereon from the date hereof until paid, together with plaintiffs’ costs and disbursements incurred in this action taxed at the sum of \$278.09.

Witness the Honorable Chase A. Clark, Judge of said court and the seal thereof this 24th day of March, 1945.

[Seal]

ED. H. BRYAN

Clerk. [73]

[Endorsed]: Filed March 24, 1945.

[Title of Court and Cause.]

PETITION ON MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT AND, IN
THE ALTERNATIVE FOR A NEW TRIAL,
AND MOTION FOR NEW TRIAL

Comes Now, R. J. Reynolds Tobacco Company, one of the above named defendants, and moves the court to set aside the verdict of the jury and the judgment entered thereon, which judgment was made and entered March 24, 1945, and to enter judgment in defendants favor notwithstanding the verdict in accordance with the motion made by said defendant for a directed verdict at the conclusion of all of the evidence, which motion is hereafter summarized and is upon the following grounds, to-wit:

(1) That the evidence is wholly insufficient to support a verdict and judgment in favor of the plaintiffs, and against the defendant, more particularly in that the evidence shows without substantial conflict that at the time the accident occurred, and for approximately eighteen hours theretofore the said Rulon D. Hair, was not acting as the Agent of said defendant, and was not within the scope of his employment, nor doing anything within his scope to further the business of his master, and was entirely upon a pleasure party of his own, and at the time of the accident referred in this cause, he was transporting Avanell Newby, now deceased, with him as his guest to her home in Montpelier, Idaho. [74]

(2) That the evidence conclusively shows that

Avenell Newby was riding in the automobile as a guest of Rulon D. Hair, which automobile was owned by R. J. Reynolds Tobacco Company, and the said Rulon D. Hair had no authority of any kind or character from either the said R. J. Reynolds Tobacco Company, or its agent, L. R. Donnelly to haul guests in said car, but had positive oral and written instructions that under no circumstances was he permitted to haul guests in said car, and that no one should be transported by him in such car, other than an employee or officer of the Company, and that this automobile was used at the time of the accident in violation of these instructions, and the evidence is wholly and completely insufficient in law to show a waiver of these instructions on the part of either R. J. Reynolds Tobacco Company, or its agent L. R. Donnelly.

(3) That the evidence wholly and completely fails to show that the said Rulon D. Hair was a careless, negligent, drunken and incompetent driver, or that he was habitually negligent, and that the one incident which occurred in Pocatello, in 1939, (referred to as the Myers' incident) is wholly and completely insufficient as a matter of law to establish the status of incompetency on the part of the driver.

(4) That the evidence wholly and completely fails to support the charge of plaintiffs, contained in paragraph numbered VII of their amended complaint, in effect that the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, permitted the said Rulon D. Hair, to use the truck of the

defendants, knowing him to be a careless, reckless, drunken and incompetent driver of an automobile, and whereby plaintiffs thereby attempted to charge negligence on the part of the defendant in such manner for the reason that the evidence wholly and completely fails to show that Hair had a status of being careless, reckless, drunken or incompetent in the use of an automobile, nor is there any evidence that any such claimed status ever came to the knowledge [75] of the defendant, R. J. Reynolds Tobacco Company, or its agent, L. R. Donnelly.

(5) That the evidence introduced and admitted for the alleged purpose of showing Rulon D. Hair to be a careless, reckless, drunken and incompetent driver of an automobile, was wholly and completely insufficient as a matter of law to establish the status of incompetency, or carelessness, or drunkenness, or recklessness on the part of Rulon D. Hair, at the time of said accident, nor that such had anything to do therewith.

(6) That the evidence fails to show that at the time of said accident Rulon D. Hair was in anywise guilty in violating the guest statute of the State of Idaho, or that he was guilty of reckless, disregard of the rights of Avenell Newby, or of any violation of any other of the requirements stated in said statute providing for recovery of the guest suffering damage, and shows that he was not guilty of any such negligence required by the guest statute at the time of said accident.

Said defendants refer to the motion for a di-

rected verdict as made in open court and as the same appears in the notes of the reporter for further particulars.

In the event of a refusal of the court to grant said motion for judgment notwithstanding the verdict, then said defendant moves in the alternative for an order setting aside verdict and judgment rendered herein, and the granting of a new trial, pursuant to rule 50 of the Rules of Federal Procedure, and also moves the court for an order granting a new trial pursuant to rule 59 of the Rules of Federal Procedure, upon the following grounds:

I.

Insufficiency of the evidence to justify the verdict, and that it is against the law in this, to-wit:

(1) The evidence fails to show that at the time of the accident in which Avenell Newby was injured, while riding as a guest in an automobile driven by Rulon D. Hair, that said Rulon D. Hair was acting as an agent, servant or employee of R. J. Reynolds Tobacco Company, or L. R. Donnelly, but on the contrary, the evidence conclusively proves that at said time, and for approximately eighteen hours theretofore the said Rulon D. Hair was not acting as such agent, servant or employee within the scope of any employment of said defendants, or either of them, but on the contrary was engaged entirely with the said Avenell Newby on a pleasure party involving only the interests of the said Rulon D. Hair and Avenell

Newby. That the presumption, if any, of the status of a driver of an automobile owned by another, or the condition and character of said car, and the time and place of its use, as to the driver's agency, in this case is completely and wholly destroyed and overcome by the positive, undisputed testimony introduced in said cause showing clearly that the said Rulon D. Hair was not acting for his employer at the time of said accident, but was wholly and completely in the furtherance of a purpose of his own.

(2) It is undisputed that Avenell Newby was riding in said automobile at the time of said accident as a gratuitous guest of Rulon D. Hair, who was not then acting within the scope of his employment and was being transported by him as such guest, contrary to positive written and oral instructions forbidding the hauling of guests or any person other than an employee of the defendant corporation. The evidence is completely and wholly insufficient, as a matter of law, to prove a waiver of said instruction to the said Rulon D. Hair, on the part of the said R. J. Reynolds Tobacco Company, or L. R. Donnelly.

(3) That the evidence introduced by the plaintiffs, [77] over the objection of the defendants, for the purpose of attempting to prove Rulon D. Hair was an incompetent, careless, drunken and reckless driver of an automobile, is wholly and completely insufficient to establish his status as such, and save for the Myers incident, referred to in the testimony, there is no evidence showing, or tend-

ing to show that the said R. J. Reynolds Tobacco Company or L. R. Donnelly had any knowledge, or information of any kind or character that the said Rulon D. Hair ever had been involved in an accident, but that the evidence, on the contrary, shows that he had a record of a high degree of competency, and care in the use of the defendant's automobile, and that the evidence thus introduced is wholly insufficient as a matter of law to establish in Rulon D. Hair a status of incompetency, or recklessness, or drunkenness, or carelessness.

(4) That the evidence introduced over the objection of the defendant, of the witnesses Pugmire, Close, Buskirk and Smullen was wholly and completely insufficient as a matter of law to establish any of the allegations of paragraph numbered VII of plaintiffs' amended complaint, wherein it is charged that defendant was negligent in hiring Rulon D. Hair, knowing him to be a careless, reckless, drunken and incompetent driver of an automobile, and that such evidence is wholly insufficient to prove such status, or that he had a reputation for such, and wholly failed to prove that any such reputation for such asserted acts or conduct, on the part of Hair, if any in fact exists, was known, or by the use of reasonable diligence could have been known to defendant R. J. Reynolds Tobacco Company, or its agent L. R. Donnelly.

(5) It is alleged, and the evidence establishes the fact that Avenell Newby at the time of the accident was riding in said automobile as a gratuitous guest of Rulon D. Hair. The evidence fails to show

that at the time of said accident the said [78] Rulon D. Hair, was guilty of violating the guest statute of the State of Idaho, or that he was guilty of reckless disregard of Avenell Newby. The evidence further shows that at the time of said accident the said Avenell Newby was riding in said automobile in company with the said Rulon D. Hair, at her request, and that she joined with the said Rulon D. Hair in any act or acts performed by him prior to said accident and during the trip in which they were jointly engaged, and that preceding said accident she was in a position to be as observant of surrounding conditions, and of such acts and omissions on the part of the said Rulon D. Hair, as was Rulon D. Hair; that she was conscious and could observe all of the acts of said Hair in the operation of said motor vehicle, but at no time made protest or objection to any act or acts regarding the operation of said automobile, but acquiesced in the conduct of Rulon D. Hair, whatever the same might have been in the operation of said automobile, and became as a matter of law, as much liable for any act or omission of the driver of said car as the driver himself could have been, and thereby became, and her heirs now are, estopped from asserting any dereliction of the said Rulon D. Hair, as a basis for a claim for damages.

That in each and all of the particulars hereinbefore before recited said evidence is insufficient in law to justify the verdict of the jury and the judgment rendered thereon, and that said verdict and

judgment, and each of them, is against the law governing and controlling such matters.

II.

Misconduct of the jury.

III.

Excessive damages appearing to have been given under the influence of passion or prejudice.

IV.

Errors in law occurring at the trial, more particularly, as follows. [79]

(1) Error of the court in denying the motion of *R. J. Reynolds Tobacco Company*, made at the conclusion of the plaintiffs' evidence, to require plaintiffs to elect upon which of the two theories recited in the amended complaint they would rely for judgment, that is to say, whether they would rely upon the theory that Hair at the time of the accident, was acting within the scope of his employment when driving Avenell Newby, as a guest; or, whether they would rely upon the theory that Hair was an incompetent, drunken, careless and negligent driver and known to be such to the defendant.

(2) The court erred in admitting in evidence, over the objection of the defendant, the testimony of *R. M. Pugmire*, *Ben Buskirk* and *Sid Close*, for the reason that in each instance said testimony was incompetent, irrelevant, immaterial and prejudicial to the defendants, more particularly in that the same did not prove or tend to prove any issue made by the pleadings.

(3) The court erred in denying defendant's motion to strike the testimony of R. M. Pugmire, Ben Buskirk and Sid Close, and the testimony of each of said parties, which motions were made after each witness had testified, upon the ground that such testimony was incompetent, irrelevant, immaterial and prejudicial to the rights of the defendant and did not prove any issue in said cause.

(4) The court erred in denying defendant's motion to withdraw from the consideration of the jury all matters relating to and evidence offered to support the allegations of paragraph Numbered VII of plaintiffs' amended complaint, upon the ground and for the reason that said issue was not properly in this cause, and that the evidence offered and admitted to prove the same was wholly insufficient for such purpose, and [80] permitting the same to be considered by the jury was prejudicial to this defendant. The evidence referred to herein, is the testimony of the witnesses Pugmire, Buskirk, Close and Smullin, and all testimony touching the alleged reputation of Rulon D. Hair, and particularly relating to the so called Myers incident.

(5) The court erred in admitting in evidence, over the objection of the defendant that the same was incompetent, irrelevant, immaterial and prejudicial to the defendant, plaintiffs' exhibit number 24, the same being a certified copy of an information, and the verdict of the jury in the case wherein Rulon D. Hair was charged and convicted of manslaughter in the Myers incident, for the reason

stated in the objection when said exhibit was offered.

(6) The court erred in admitting in evidence, over defendant's objection, that the same was incompetent, irrelevant, immaterial and prejudicial, plaintiffs' exhibit 9, the same being a photograph of Avenell Newby taken approximately two years before her death, for the reason stated in defendant's objection to the introduction of said exhibit.

(7) The court erred in permitting the plaintiffs to introduce in evidence on their direct case, over the objection of the defendant that the same was irrelevant, immaterial, incompetent and prejudicial to its interests, the testimony on cross examination of the witness, E. A. Darr, particularly insofar as the same dealt with instructions to Rulon D. Hair, concerning the hauling of guests, and all matters touching the so called Myers incident of 1939.

(8) The court erred in denying defendant's motion for a directed verdict in its favor, for the reasons hereinbefore recited. [81]

(9) The court erred in permitting the plaintiff, during the trial, over the objection of the defendants, that the same was immaterial to the issue, and prejudicial to the defendant, to amend their amended complaint by adding the word "drunken" in paragraph VII thereof.

(10) The court erred in giving to the jury that certain instruction, reading as follows:

"You are instructed, that if you believe that Rulon D. Hair, who has been mentioned many times during the trial of this case as the driver of the

truck was a careless, reckless, drunken, incompetent driver, and that the defendants R. J. Reynolds Tobacco Company, and L. R. Donnelly knew, or by the use of reasonable diligence could have known that he was a careless, reckless and incompetent driver, or that he was acting as the agent, servant, or employee of the R. J. Reynolds Tobacco Company or L. R. Donnelly, within the course and scope of his employment as these terms are defined for you in these instructions, then you would be justified in finding against the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly.”

for the reason that said instructions deal with an issue not properly before the jury, and upon which no competent or sufficient evidence justified the submission of the matter contained in said instruction to the jury.

(11) The court erred in giving to the jury all of instructions numbered 9 and 15, upon the same ground and for the same reason set forth as objections to the last above quoted instruction.

(12) The court erred in giving to the jury that certain instruction, reading as follows:

“You are instructed that one driving an automobile owned by another is presumed to be the agent of the owner of said automobile.”

upon the ground and for the reason that the same is too limited in its wording and does not contain the necessary limitations with respect to the facts and circumstances under which said automobile was

used and the evidence adduced with respect thereto.

(13) The court erred in giving to the jury that certain instruction, reading as follows:

“The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the state statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that statute it is provided that it shall be prima facie lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute that it shall be prima facie unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities,”

upon the ground and for the reason that said instruction is based upon a statute covering ordinary negligence in which automobiles may be involved and does not have application in the instant case, or to any case where the guest statute is involved,

and that said instruction tends to mislead and confuse the jury into considering a case in which this law is involved rather than involving the guest statute.

(14) The court erred in giving to the jury that certain instruction, reading as follows:

“You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenell Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenell Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenell Newby, then your verdict should be for the plaintiffs, if you find for the plaintiffs upon the other issue,”

upon the ground and for the reason that said instruction does not cover the pleadings and the facts in this case, particularly in that there is no allegation that the said Rulon D. Hair was intoxicated at the time of the accident, and intoxication [83] is not pleaded as a ground for recovery under the guest law, and as such could not be the proximate cause of the death of Avenell Newby, and is addressed to an issue which is not properly involved in this case, in that the question of the status of Rulon D. Hair as a driver is not properly before the court on an issue attempting to bind his employers.

(15) The court erred in giving to the jury that part of instruction number 26, reading as follows:

“The amount of damages, if any, which you allow shall in no event exceed the amount prayed for in the plaintiffs’ complaint,”

upon the ground and for the reason that the plaintiffs in this case should not be allowed to recover more than \$7500.00, the same being the amount heretofore awarded against Rulon D. Hair, as the agent, servant and employee of said defendant, and that the jury should have been so instructed with the instruction on damages.

(16) The court erred in refusing to give to the jury defendant’s requested instruction number 11, reading as follows:

“You are instructed, that in respect to the issue as to damages, if you come to consider that issue, the court charges you as a matter of law, that in no event in this case can you award damages against the defendants in excess of the sum of \$7500.00,”

for the reason that this case has heretofore been tried before a jury as against these defendants and Rulon D. Hair, the agent, servant and employee of said defendant, with a joint verdict having been rendered in the sum of \$7500.00, from which judgment the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly appealed to the Circuit Court of Appeals of the Ninth Circuit and Rulon D. Hair, did not appeal, and that the said Circuit Court of Appeals reversed the judgment as to

the defendant R. J. Reynolds Tobacco Company and L. R. Donnelly and remanded the matter for a new trial, and a new trial has been had against the last named defendants, and that the amount heretofore awarded [84] against the said Rulon D. Hair, servant, agent and employee of the R. J. Reynolds Tobacco Company and L. R. Donnelly became final and fixed the amount for which any judgment could be rendered against his employer, the R. J. Reynolds Tobacco Company.

(17) The court erred, after having refused to give defendant's instruction number 11, to the jury, in its refusal to give instruction number 12, reading as follows:

"You are instructed that this cause has heretofore been tried and a verdict rendered against all of said defendants in the sum of \$7500.00. R. J. Reynolds Tobacco Company and L. R. Donnelly appealed said cause to the Appellate court. Rulon D. Hair did not appear. Said judgment was reversed as to R. J. Reynolds Tobacco Company and L. R. Donnelly and the cause was remanded for a new trial as against them. The judgment against Rulon D. Hair was not appealed from either by him or by the plaintiffs. It therefore is final so far as Rulon D. Hair is concerned, and you are to decide this case upon the issues of whether or not R. J. Reynolds Tobacco Company and L. R. Donnelly are also responsible. In this respect, you are specifically charged that the judgment against the defendant, Hair, should not in any sense be taken by you as any evidence of any liability on the part of the Tobacco Company or L. R. Donnelly, but that you must de-

cide the case, so far as liability may be concerned, or the lack of it, as though no previous judgment had been rendered. In this respect, however, you are definitely charged that in the event you should find against these defendants and determine to assess damages, you can not render a verdict in excess of \$7500.00. This does not mean that the verdict, if you find against said defendants, should reach said sum, but that you are authorized, if you find the plaintiffs entitled to recover against the Tobacco Company and L. R. Donnelly, to fix the amount in such sum as you may find said plaintiffs have been damaged by the acts of the R. J. Reynolds Tobacco Company and L. R. Donnelly, not exceeding, however, the sum of \$7500.00,"

For the same reasons asserted as error for the failure to give the preceding instruction.

(18) The court erred in refusing to give to the jury defendant's requested instruction number 18, reading as follows:

"You are further instructed, that where a gratuitous guest, riding in an automobile being driven by another, fails to protest against the driver's proceeding at an excessive speed, such conduct constitutes contributory negligence as to preclude recovery for injuries and damages occasioned by such excessive speed."

upon the ground and for the reason that the law of the State of [85] Idaho is to the effect that a guest in an automobile is under the necessity of protesting the conduct of the host, and a failure to protest

against excessive speed, and conduct contributing to the accident, when such guest has an opportunity to do so, precludes recovery for injuries and damages by said guest.

(19) The court erred in refusing to give to the jury defendant's requested instruction number 20, reading as follows:

"The court instructs the jury that the answer of the defendants in this case alleges affirmatively that any injury caused Avenell Newby was due to her own acts of negligence. This is equivalent to an allegation that the contributory negligence of Avenell Newby had a casual connection with the injury. The burden of establishing contributory negligence by a preponderance of the evidence rests upon the defendants. This burden may be discharged but never shifted. You are instructed that the burden is upon the defendants under their charge of contributory negligence to prove not only that Avenell Newby was negligent but that her negligence contributed to and had a casual connection with her death. If, however, contributory negligence appears on the plaintiffs' side of the case and from the plaintiffs' witnesses, whether the same be by direct examination or under cross-examination, and from such testimony you find that there was contributory negligence in this case, then and in that event you are instructed that you should consider such defense even though no testimony was offered affirmatively by the defendants in the proof thereof. In this connection, you are further instructed that contributory negligence means: Negligence on the part of Avenell

Newby either by an act on her part or omissions when a reasonable person would have acted in an effort to prevent the injury, and which negligence helped to cause or bring about the injury complained of; and you are further instructed that if you believe the said Avenell Newby could have prevented the injury, and failed to do so, you should find for the defendants,”

for the reason that under the facts in this case the question of contributory negligence of Avenell Newby, is a defense pleaded and asserted herein, and is supported by the evidence, and that said matter ought to have been submitted to the jury for its consideration, as a defense of the defendant R. J. Reynolds Tobacco Company. [86]

(20) That the court erred in refusing to give to the jury defendant's requested instruction number 21, reading as follows:

“You are further instructed, that a gratuitous guest may not recover for his host's negligent operation of an automobile if conscious of apparent danger, or advised of such conditions and circumstances as would herald danger to a reasonably prudent person, he fails opportunely to protest, and acquiesces therein, and if you find from the evidence in this case that Avenell Newby knew, or as a reasonably prudent person should have known that Rulon D. Hair was operating and driving said automobile in a dangerous manner, and you further find that Avenell Newby after a seasonable opportunity so to do, failed to opportunely protest against such dan-

gerous driving and operation of said automobile, then, and in that event, the plaintiffs cannot recover,”

for the reason that the pleadings and evidence in this case is such as to render it necessary to advise the jury with reference to the conduct and duty of the guest in the car, and this requires such guest to seasonably protest to the conduct of the driver of the car, and under the law, if she failed so to do, she would assume all risks and can not recover.

(21) The court erred in refusing to give to the jury defendant's requested instruction number 22, reading as follows:

“You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair had been drinking intoxicating liquor, and that the said Avenell Newby joined with him and also drank intoxicating liquor, and that the two of them were riding in said automobile while under the influence of intoxicating liquor, then, and in that event, you are instructed that the said Avenell Newby assumed the risk of any danger or damage that might result from the use of intoxicating liquor and was contributorily negligent in her conduct, and under such circumstances, the plaintiffs cannot recover in this case,”

for the reason that under the law of Idaho, if a guest participates and joins with a driver of an automobile in imbibing intoxicating liquor, the guest is equally liable, with the driver, and is contributorily

negligent, and assumes the risk of riding in such automobile with such host, and can not recover for any such injury. [87]

The reasons heretofore assigned as error on the part of the court in giving those certain instructions hereinbefore objected to, and the reasons assigned as error on the part of the court in refusing to give the foregoing requested instructions were in each instance, timely made at the trial of said cause.

(22) The court erred in entering judgment against the defendant, R. J. Reynolds Tobacco Company, when the jury found that the defendant L. R. Donnelly, was not liable by failing to find a verdict against him, particularly in that any liability, if any existed on the part of the Company, was by reason of knowledge or acts of Donnelly as Division Manager of said Company, and if he was not liable, then this defendant could not be liable.

(23) The court erred in entering judgment on the verdict against the defendant, R. J. Reynolds Tobacco Company.

The foregoing Motion and the whole of it, is based and will be made upon all of the records, files, pleadings and proceedings in the above entitled action, including the instructions given, and the instructions requested by the defendants and refused by the court, and upon the affidavit in support of motion for new trial by A. L. Merrill, filed herewith, directed particularly to excessive damages and misconduct of the jury, and upon the minutes of the court, as stated and defined in the Federal Rules of Civil Procedure, and as stated and defined in Rule 50 of

the practice of this court, and Reporter's transcript of testimony adduced in said cause.

E. B. SMITH,

Residing at Boise, Idaho.

A. L. MERRILL,

R. D. MERRILL,

Residing at Pocatello, Idaho.

(Service Admitted.)

[Endorsed]: Filed March 31, 1945. [88]

[Title of Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR
NEW TRIAL

State of Idaho,

County of Bannock—ss.

A. L. Merrill, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendants, R. J. Reynolds Tobacco Company, a corporation, and L. R. Donnelly, in the above entitled court and cause; that he makes this affidavit in support of the motion for a new trial herewith made in the above cause by R. J. Reynolds Tobacco Company.

That the trial of said action commenced at 10:00 A.M. on Monday, the 19th day of March, 1945, and continued without interruption until the evening of March 23, 1945; that it was tried before a jury on said days, at the Court Room in the Federal Court House in Pocatello, Idaho; that said jury consisted

of two women and ten men, who lived at various points within the Eastern Division of the District of Idaho, and outside of the city of Pocatello.

That during the progress of said trial said case was highly publicized by headlines and articles which appeared in the Salt Lake Tribune, published at Salt Lake City, Utah, and having wide circulation in Pocatello and in said division, and in the Pocatello Tribune, published at Pocatello, Idaho, with a large circulation therein and in the surrounding counties; that said articles so published and circulated, as aforesaid, were calculated to, and affiant believes [89] did, affect the readers adversely to the position of the defendants, and particularly the members of the jury who may have read the same. As illustrative of the type and character of such publicity, affiant avers as follows:

That in the Salt Lake Tribune published Tuesday Morning, March 20, 1945, and circulated freely in Pocatello, Idaho, appeared an article with a headline in 24 point caps and lower case type, reading as follows:

“Machinist Flies From Saipan for \$100,000 Suit
Retrial”

In said article it is recited:

“Pocatello, Ida.—George H. Newby, motor machinist mate 1/C, Montpelier, flew home from his station on Saipan island to appear in federal district court Monday as co-plaintiff with his young son and daughter in re-trial of a \$100,000 damages suit involving the death of his wife in 1942.

Defendant is R. J. Reynolds Tobacco Co.

Plaintiff charged that his wife, Mrs. Avenell Newby, 28, died Sept. 16, 1942, from injuries sustained in an auto accident five days earlier on Highway 30, about 20 miles north of Montpelier. Mr. Newby contends she was a guest of Rulon D. Hair, Montpelier, company agent, in his fully loaded tobacco truck."

Later in the same article it is said:

"The Pacific veteran and his son and daughter, Richard Arlen Newby, 11, and Patty Ann Newby, 8, were awarded \$7500 a year ago in Idaho federal court. The tobacco company then appealed to the Ninth (San Francisco) court of appeals, and that court reversed the decision as it affected the company. They did not reverse the lower court's verdict against their agent, Mr. Hair."

On each day during the trial there appeared in said newspapers constantly reference to the "\$100,000 Damage Suit."

In the Pocatello Tribune of March 21, 1945, under a headline, "Damage Suit Before Court," it is recited:

"Retrial of the Newby vs. R. J. Reynolds Tobacco Company suit Monday brought the dramatic return of George H. Newby from his base on Saipan island where he is a motor machinist mate first class.

Newby, with his 11-year-old son Richard, and eight-year-old daughter Patty Ann, is suing the company for \$100,000 damages as the result of the death of the children's mother in 1942. Mrs. Newby

died Sept. 16, five days after she was injured in an accident while riding in a tobacco company truck with Rulon D. Hair of Montpelier.” [90]

In this article further reference is made to the previous trial and the fact that a verdict of \$7500.00 had been awarded the plaintiffs, and the jurors’ names were given.

In the Salt Lake Tribune of Thursday Morning, March 22, 1945, appears the following under an enlarged headline of 24 point caps and lower case type, as follows:

Retrial of \$100,000 Damage Suit Enters
Third Day

Testimony Centers on Record of Driver, Previous Accident, Conviction; Firm Investigator Tells of Own Probe.

Pocatello, Ida.—A stormy retrial entered its third day Wednesday in federal district court between parties involved in a \$100,000 damage suit.

Plaintiffs were George H. Newby, motor machinist mate in the navy and Pacific war veteran, and his young son and daughter. They charge R. J. Reynolds Tobacco Co. and its division manager, L. R. Donnelly, Salt Lake City, with negligence in the auto accident death on Sept. 16, 1942, of Mr. Newby’s wife, * * *

The said article then attempts to review the past history of Mr. Hair and recites that he “had been arrested for drunken driving and for the accidental death of Jacob Myers, Pocatello.”

On March 22, 1945, the Pocatello Tribune contained an extended article under a headline in 24 point caps and lower case type, reading as follows:

“Case Argued in U. S. Court,” and then it is recited:

“Basis of George Newby’s \$100,000 suit against the R. J. Reynolds Tobacco company and its alleged agent, Rulon Hair, was revealed yesterday in federal court * * *.”

It is then recited that Hair had been previously arrested and convicted of manslaughter. In said article it is further recited:

“April 16, 1939, he (Hair) struck and killed Jacob Myers, while driving a company truck on East Center Street in Pocatello * * *.”

On Friday Morning, March 23, 1945, there appeared in the Salt Lake Tribune, a conspicuous article with a headline in 24 point caps and lower case type, reading as follows:

“Lawyers Rest in Retrial Damage Suit,” and it is then recited:

“Pocatello, Ida.—Both sides rested their case late Thursday [91] as defense attorneys completed presentation of evidence against the plaintiff in a \$100,000 damage suit retrial in federal district court.

Court attaches said the case will likely go to the jury by Friday afternoon. Involved are George H. Newby, 37, navy motor machinist mate, Montpelier, seeking to collect from the R. J. Reynolds Tobacco Co., for the auto accident death in 1942 of his wife,

Mrs. Avanell Newby, a guest passenger in a Reynolds Tobacco Co. truck."

That there appeared similar articles in each issue of said newspapers during said period of time and in every article it was stressed that this was a "\$100,000 Damage Suit," and the fact that George H. Newby, as plaintiff, was in the service of the country, and the inference in each article was that he was attempting to make recovery for himself and children.

That said newspapers were freely distributed in Pocatello during said week and were available at all news-stands and hotels; that affiant believes that same were read by the various members of the jury; that on Friday, the 23rd day of March, 1945, affiant saw a copy of a newspaper, which he believes was the Salt Lake Tribune, in the hands of one of the jurors during the forenoon and as she sat in the jury box.

After the appearance in the Salt Lake Tribune of the article dated March 20, 1945, affiant and co-counsel in said cause, interviewed the news-reporter for the Salt Lake Tribune and made a request that the proceedings of this cause be not further reported, and particularly that such language as above quoted or the substance thereof, be not used again, but that said request was of no avail.

Affiant further avers that at least five of said jurors who tried said cause had sons or close members of their families in the navy of the United States, and others had sons in the armed forces;

that during the entire time said case was tried the plaintiff, George H. Newby, was before the jury in navy uniform, and during the first four of said days said minor children aged 8 and 11, occupied conspicuous places before the jury.

That over the objection of the defendants there was permitted to be introduced in evidence, as plaintiff's Exhibit 9, a photograph of [92] Avaneil Newby taken approximately two years prior to her death, and which photograph, under the various circumstances in this cause, and particularly those hereinbefore recited, affiant believes had a perceptible affect upon the jury.

That said cause was hereinbefore tried before a jury in the same court, at a time when R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, were all defendants, and when the said George H. Newby was in civilian clothes, and the newspapers contained substantially nothing with reference to the trial, which verdict so rendered by said jury was for \$7500.00, upon evidence substantially the same; that in the second trial the said Rulon D. Hair was not a party and the jury did not have occasion to consider matters as against him, and said jury did not find a verdict against L. R. Donnelly, but returned a verdict in the sum of \$30,000.00 against the R. J. Reynolds Tobacco Company.

This affidavit is intended to be in support of those grounds of said Defendants Motion for a New Trial charging excessive damages, appearing to have been

given under the influence of passion and prejudice, and misconduct of the jury.

A. L. MERRILL.

Subscribed and Sworn to before me this 30th day of March, 1945.

[Seal] S. A. DUNN,
Notary Public, Residing at Pocatello, Idaho.

My commission expires: 3-1-47.

(Service Admitted.)

[Endorsed]: Filed March 31, 1945. [93]

[Title of Court and Cause.]

AFFIDAVIT IN OPPOSITION TO AFFIDAVIT OF A. L. MERRILL, FILED IN SUPPORT OF MOTION FOR A NEW TRIAL

State of Idaho,
County of Bannock—ss.

B. W. Davis, being first duly sworn, deposes and say:

That he is one of the attorneys for the plaintiffs in the above entitled cause and that he presented the evidence in said cause at the trial thereof to the jury without the assistance of any other counsel; that he has been a member of the bar of the State of Idaho, admitted to practice in all courts therein, for over thirty years and that he has been admitted to practice before the Federal District Court for Idaho for at least twenty-five years;

That he has carefully read the affidavit of A. I. Merrill, one of the counsel for the R. J. Reynolds Tobacco Co.; that with reference to Mr. Merrill's affidavit concerning the publicity given to the trial of the cause in daily newspapers, that the quoted portions of said publicity are no more prejudicial than plaintiff's complaint, and that it does not appear from the portions of newspaper articles quoted in the affidavit, that they could have prejudiced the jury or that they were read by the jury. That this affiant did not at any time during the trial see any newspapers in the possession of the jury except that on the afternoon of the final argument, the alternate juror, a Mrs. Moss from Idaho Falls, who was excused from jury duty after the [94] submission of the cause, did have a newspaper of some description in her hand;

That neither this affiant nor the plaintiff, at any time during the trial of said cause, made any suggestions to any newspaper reporter, nor discussed the case in any way with anyone connected with any newspaper as a reporter or otherwise; that no suggestion was ever made to this affiant by counsel for the Reynolds Tobacco Company or either of them, that they had any objection to articles being published in newspapers or that the jurors should not read the newspapers or that they desired that anything be done by counsel with respect thereto; that no suggestion was ever made by either of counsel for the defense to the court, that the jurors should be requested to not read the newspapers or that they were reading newspapers and the affidavit

of counsel in support of his motion for a new trial, does not state that any of the jurors at any time, read anything with reference to the trial of said cause in the newspapers; that if counsel for defendant spoke to any newspaper reporter and protested the publicity given the trial and the reporter ignored said request, counsel did not convey such information to this affiant or to the court at any time during the progress of the trial and this affiant believes that it was the duty of counsel to do so, if counsel for defendant thought the same was prejudicial; that it could hardly be expected that the jurors would ignore the daily newspapers when the news was very sensational insofar as the success of the United States Armed forces were concerned, at that particular time.

With reference to the affidavit of counsel for the defendant, that several of the members of the jury had sons or members of their families in the Navy or in the Armed Forces, the defendant only exercised one peremptory challenge to the members of the panel and did not request the allowance of any other or additional challenges; [95]

That George H. Newby did appear at the trial in the Navy Uniform; that his minor children were in the court room for three days of said trial, Monday, Tuesday and Wednesday, and Thursday forenoon, left the city and did not return; that this affiant did not at any time or in any way during the trial of said cause, do anything or attempt to do anything to play upon the sympathy or the prejudice of the jury because of the fact that plain-

tiff was in the service of his country; that not one single objection was made by counsel for the defense to either the opening or closing argument of this affiant to the jury; that not once during said trial, was there any animosity displayed between Counsel on either side toward the other counsel; that the case could not have been tried in a more gentlemanly or ethical manner in so far as counsel on both sides was concerned; that this affiant never once, during the trial or the argument, made any mention of the fact that Mr. Newby was in the service of his country;

That with reference to the next to the last paragraph of Counsel's affidavit concerning the rendition of a \$7,500.00 verdict in a former trial, the jury was instructed to entirely disregard any and all matters that they may have heard with reference to any former trial and such instruction was requested by the defendant.

This affidavit is made in opposition to the affidavit of Counsel for the defendant in support of its motion for a new trial herein.

B. W. DAVIS

Subscribed and Sworn to before me this 18th day of April, 1945.

[Seal]

LAURA S. GOUGH

Notary Public, Residing at
Pocatello, Idaho

(Service admitted.)

[Endorsed]: Filed April 20, 1945. [96]

[Title of Court and Cause.]

MINUTES OF THE COURT

June 6, 1945

This matter came on regularly to be heard on the Petition on Motion for Judgment notwithstanding the verdict, and in the alternative, for new trial, and motion for new trial; B. W. Davis, Esquire, of Pocatello, Idaho, appearing for the plaintiffs, and Messrs. Merrill & Merrill, of Pocatello, Idaho, and E. B. Smith, Esquire, of Boise, Idaho, appearing for the defendant, R. J. Reynolds Tobacco Company.

The Motion for Judgment notwithstanding the verdict, and in the alternative, for new trial, and motion for new trial, on behalf of the defendant, R. J. Reynolds Tobacco Company was argued by counsel for the respective parties, and by the Court taken under advisement.

[Title of Court and Cause.]

ORDER

Defendant Reynolds Tobacco Company having heretofore filed its motion for judgment notwithstanding verdict and, in the alternative for a new trial, and motion for new trial, and the Court thereafter having heard counsel for plaintiffs and defendants present the matter in open Court and having fully considered the said motions,

It Is Ordered that the motions be and the same are hereby denied.

Dated at Boise, Idaho, this 8th day of June, 1945.

CHASE A. CLARK,

United States District Judge

[Endorsed]: Filed June 8, 1945. [98]

[Title of Court and Cause.]

NOTICE OF APPEAL BY R. J. REYNOLDS
TOBACCO COMPANY

Notice is Hereby Given that R. J. Reynolds Tobacco Company, a corporation, one of the defendants above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment made and entered in the above entitled court and cause on the 24th day of March, 1945, which said judgment is in favor of the plaintiffs above named and against this appealing defendant, and from the order denying new trial made and entered June 8, 1945.

Dated this 13th day of June, 1945.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for defendant R. J.

Reynolds Tobacco Company

[Endorsed]: Filed June 13, 1945. [99]

[Title of Court and Cause.]

COST BOND ON APPEAL OF R. J. REYNOLDS TOBACCO COMPANY

Know All Men by These Presents:

That R. J. Reynolds Tobacco Company, a corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound unto George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, the above named plaintiffs, and appellees in the above entitled cause, in the sum of Two Hundred Fifty (\$250.00) Dollars, for which sum well and truly to be paid we bind ourselves and our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13th day of June, 1945.

Whereas, on the 24th day of March, 1945, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that Court wherein George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, were plaintiffs, and R. J. Reynolds Tobacco Company, and L. R. Donnelly were defendants, a judgment was rendered against the

defendant, R. J. Reynolds Tobacco Company, in the sum of \$30,000.00, with interest and costs, and [100] said defendant, R. J. Reynolds Tobacco Company, having filed in the office of the Clerk of said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

Now, Therefore, the condition of this obligation is such, that if the said R. J. Reynolds Tobacco Company, the appellant, shall prosecute said appeal and pay all costs that may be rendered against it if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award against said defendant if the judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

**R. J. REYNOLDS TOBACCO
COMPANY**

By **E. B. SMITH**

One of its attorneys of record
Residing at Boise, Idaho
Principal

**UNITED STATES FIDELITY
AND GUARANTY COMPANY**

By **HENRY WHITSON**

Its attorney in fact
Surety

[Seal]

HENRY WHITSON

Resident Agent Residing at
Boise, Idaho

[Endorsed]: Filed June 13, 1945. [101]

[Title of Court and Cause.]

ORDER APPROVING BOND AND GRANT-
ING STAY OF EXECUTION AGAINST R.
J. REYNOLDS TOBACCO COMPANY

The defendant, R. J. Reynolds Tobacco Company having this day filed its Notice of Appeal from the Judgment rendered in the above entitled cause in favor of the plaintiffs, George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian Ad Litem, George H. Newby, and against the defendant, R. J. Reynolds Tobacco Company, to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed its petition for an order fixing the amount of the supersedeas bond and approving the proposed surety, and the form of said bond and granting a stay of proceedings;

Now, Therefore, It is hereby ordered that the amount of said Supersedeas Bond be fixed in the sum of Thirty Five Thousand (\$35,000.00) Dollars, and the bond tendered by the said R. J. Reynolds Tobacco Company in said sum with Maryland Casualty Company, a corporation, as surety, be and the same is hereby in all respects approved, and that all proceedings herein for the collection of said judgment against R. J. Reynolds Tobacco Company be and they are hereby stayed according to law.

Dated this 13th day of June, 1945.

CHASE A. CLARK,
District Judge

[Endorsed]: Filed June 13, 1945. [102]

In the District Court of the Fifth Judiciary District of the State of Idaho, in and for Bannock County

B-1591

STATE OF IDAHO,

Plaintiff,

vs.

RULON D. HAIR,

Defendant.

VERDICT

We, the Jury in the above entitled cause, find defendant guilty as charged in the information and we the Jurors recommend all leniency possible.

J. P. JENSEN,

Foreman

[Endorsed]: Filed Dec. 3, 1939. [109]

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock

Register No. B-1591

STATE OF IDAHO,

Plaintiff,

vs.

RULON D. HAIR,

Defendant.

CERTIFICATE

I, Anna Keefe, Clerk of the District Court of the Fifth Judicial District of the State of Idaho,

in and for Bannock County, hereby certify that the original files in the above entitled cause are on file in my office; that I have custody and control of the same and that the same are official records of the Fifth Judicial District of the State of Idaho, in and for Bannock County;

That the above and foregoing Prosecuting Attorney's information and verdict are true and correct copies of the originals on file in my office and that the verdict rendered is the verdict rendered upon the trial of the defendant, Rulon D. Hair, upon the charges set out in the Prosecuting Attorneys Information.

Dated this 16th day of March, 1945.

(Seal) (Sgd.) ANNA KEEFE

Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County.

[Title of Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed that, good cause existing therefor, the following exhibits may be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof and in lieu of having the same printed in the record, the remaining exhibits having been designated

in the contents of the record for printing which will also include defendants' Exhibits Nos. 18, 21 and 22, included in the deposition of E. A. Darr, excepting plaintiffs' Exhibit No. 23 which was not offered to the Clerk after rejection, and which exhibits thus stipulated to be transmitted are of such character as to be difficult to print and can best be considered by the appellate court in their original form, being numbered and described as follows:

No. 1—Business card of L. R. Donnelly.

No. 2—Photograph of car.

No. 3—Photograph of car.

No. 4—Photograph of car.

No. 5—Drawing or map.

No. 6—Drawing or map (admitted for illustrative purposes).

No. 7—Report of Bunderson (made by Hair to Bunderson). [113]

No. 8—Report of Bunderson.

No. 9—Photograph of deceased in frame.

No. 10—Motor registration receipt, 1939.

No. 11—Motor registration receipt, 1940.

No. 12—Motor registration receipt, 1941.

No. 13—Motor registration receipt, 1942.

No. 14—Report of L. R. Donnelly, dated September 15, 1942.

No. 15—Report of R. D. Hair.

No. 16—Corrected report of R. D. Hair.

No. 27—Card of National Safety Council, Inc., dated April 16, 1942, issued to R. D. Hair.

Dated this 27th day of June, 1945.

GLENN A. GOUGHLIN

B. W. DAVIS

Attorneys for plaintiffs and
appellees.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for defendants and
appellants.

[Endorsed]: Filed June 29, 1945. [114]

ORDER

It Appearing to the Court that the defendant, R. J. Reynolds Tobacco Company, by separate appeal, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and it further appearing that there are certain exhibits which would be difficult to print or to make copies thereof and can best be presented to the appellate court in their original form; and said parties having stipulated in the premises,

It Is Hereby Ordered that the foregoing stipulation is hereby approved, and pursuant thereto,

It Is Further Ordered, and this does order, that the exhibits described in said stipulation and hereby referred to for further particulars shall be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be by such Court held for inspection and used on appeal so taken by said appellants.

Dated: July 2nd, 1945.

CHASE A. CLARK,
District Judge

[Endorsed]: Filed July 2, 1945. [115]

[Title of Court and Cause.]

TRANSCRIPT

This matter was tried before the Honorable Chase A. Clark, United States District Judge, for the District of Idaho, sitting with a jury, at Pocatello, Idaho, on March 19, 1945.

Appearances:

Glen a Coughlan, Montpelier, Idaho; Ben W. Davis, Pocatello, Idaho, Attorneys for the Plaintiffs.

E. B. Smith, Boise, Idaho; Messrs. Merrill & Merrill, Pocatello, Idaho, Attorneys for the Defendants. [116]

March 19, 1945

10 O'Clock A.M.

The Court: This is the time set for the trial of the case of Newby v. Reynolds Tobacco Company, are you gentlemen ready?

Mr. Davis: The plaintiffs are ready.

Mr. Merrill: We are ready, but there arises the question as to who are the defendants in this case now. When it was tried before there were three defendants, The Tobacco Company and Mr. Donnelly and the Salesman, Mr. Hair, but now——

The Court: I take it now that there are only The Reynolds Tobacco Company and L. R. Donnelly, the case is in the condition that it would have been had Hair never been made a party.

Mr. Merrill: In this case there has been a trial and a judgment for \$7500.00 rendered against three

defendants; two of them appealed and the third did not appeal; as against the third defendant the judgment is final. Now this case comes here as against the employers of Mr. Hair and it is our position that the maximum of any damage that might be recovered is fixed by that prior judgment from which no appeal was taken either by Mr. Hair or the Plaintiffs and that, therefore, in this case, the trial is against the R. J. Reynolds Tobacco Company and L. R. Donnelly on all issues, and we insist that it is the duty of the Court to instruct the jury [122] that if they come to consider the question of damages they cannot find more than \$7500.00 which is the final judgment in this case heretofore rendered against the servant. We have abundant authorities on that.

The Court: It is my understanding that the rule is to the contrary,—did you have something to say Mr. Davis?

Mr. Davis: I wanted to ask counsel if he takes the position that \$7500.00 is all or as large a judgment as we could recover, but that we might recover a less amount and that would bind us.

Mr. Merrill: Yes.

Mr. Davis: Your position is that the maximum is \$7500.00, but that a lesser judgment might be returned?

Mr. Merrill: That's right.

(Further remarks of Counsel.)

The Court: One question I have in mind here: If under the law and rules they were not joint

tortfeasors, would it be just a question for the jury as to whether Mr. Hair was acting within the scope of his employment. If so, then the jury should bring in a verdict for \$7500.00. Is that the contention?

Mr. Merrill: I think there is only one question involved. Whether or not Hair, at the time of the accident was performing acts in favor or for his employer,— [123]

The Court: Pardon me, Mr. Merrill, let me ask, what position do you take, Mr. Black?

Mr. Black (Representing Mr. Hair): I take the position that the Judd case settled it.

The Court: You don't elect to have Mr. Hair brought into the case.

Mr. Black: No.

The Court: I would like to consider this matter and we will take a recess now until 2 o'clock, I would like to go over the authorities counsel mentioned.

(2 O'Clock P.M., March 19, 1945)

The Court: In view of the position of counsel for the defendants, that Hair is not a party to this suit because he did not appeal and has settled the matter as far as Hair is concerned, and in view of the fact that Mr. Hair is here with his attorney and has announced to the Court that they have no interest in this suit and that the matter has been finally settled so far as Hair is concerned and there is no desire on their part to take advantage of the reversal as against the plaintiff. As to Donnelly

and Reynolds Tobacco Company the case will proceed and the question of damages that is, as to the amount of recovery to which they are entitled, in case there is a recovery, in reference to the verdict which has been heretofore rendered against Hair; the Court will reserve ruling on that [124] until the matter is submitted to the jury; then the matter will be taken care of in instructions to the jury. In the meantime if counsel have any other authorities that they would like to present to the Court during the trial I would appreciate them. I would appreciate any authorities either side may have on this matter.

Mr. Davis: I ask that Mr. Hair be kept here as a witness.

The Court: Yes. I presume that he would be here during the trial, anyway.

(Whereupon the jury was selected. Statements were made to the jury by Counsel for the plaintiffs and Counsel for the defendants.)

R. B. LINDSEY,

being called as a witness on the part of the Plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Your name, please?

A. R. B. Lindsey.

Q. Where do you live, Doctor?

(Testimony of R. B. Lindsey.)

A. Montpelier, Idaho.

Q. How long have you lived there?

A. Since 1937.

Q. And have been practicing medicine there during that time have you, Doctor?

A. Yes, since 1937. [125]

Q. Are you a graduate of a recognized medical school? A. Yes, sir.

Q. What school are you a graduate from?

A. Northwestern University Medical School.

Q. And you are admitted to practice as a physician and surgeon in Idaho? A. Yes, sir.

Q. Did you know Avenell Newby during her lifetime? A. Yes, sir.

Q. How long had you known her?

A. Approximately six months, I guess.

Q. Had you had occasion to treat her during the year 1942? A. Yes, sir.

Q. I call your attention to the date of September 11, 1942, was that the occasion on which you treated her? A. Yes, sir.

Q. And what time of day was it, Doctor?

A. Approximately five o'clock.

Q. In the afternoon? A. P. M., yes, sir.

Q. Where did you first see her that day?

A. In Mr. McGuire's car.

Q. Where was that?

A. Parked in the street to the side of the hospital.

Q. What was done with her at that time?

(Testimony of R. B. Lindsey.)

A. We carried her into the hospital and put her to bed. [126]

Q. Did you make an examination of her at that time? A. Yes, sir.

Q. What did you find?

A. I found a very severe crushing of the chest and abdomen with evidence of internal injury.

Q. What happened to her?

A. She later died.

Q. Was that on the 16th of September that she died, if you know? A. Yes, it was.

Q. In your opinion, Doctor, what was the cause of her death?

A. Internal injuries to her chest and to the vital organs of the abdomen.

Q. Before that time had you had occasion to see her? A. Yes, sir.

Q. What was her condition as to her being a healthy woman?

A. She consulted me about three months previous to that time as to the treatment of a cold and her health other than the cold at that time was very good.

Mr. Davis: That is all, thank you, Doctor.

Cross Examination

By Mr. Smith:

Q. After you had placed Mrs. Newby in the hospital you examined her, did you?

A. Yes, sir.

Q. State briefly the extent of your examination.

A. A complete examination of the head, eyes,

(Testimony of R. B. Lindsey.)

face, mouth, neck and in fact a complete examination of the body, including the heart and lungs?

Q. Now, Doctor, did you make any examination of the contents of the stomach?

A. I didn't make a special examination of the contents of the stomach, but she vomited and I made just a gross examination of it.

Q. Doctor, in your opinion from the so-called gross examination of the contents of the stomach, in your judgment and in your opinion was there any presence of an alcoholic condition?

A. I would say that it was my impression that there was.

Q. How long was it after she was placed in the hospital that you had the opportunity of observing the contents of the stomach and what occurred which gave you that opportunity?

A. That was within about five minutes after she was in the hospital.

Q. What occurred which afforded you that opportunity?

A. She became very nauseated and vomited.

Q. You had an opportunity to examine her mouth and to detect any odors on her breath?

A. Yes, sir.

Q. What in your opinion, based on that examination as to whether or not there was the presence of alcoholic odor on her breath? [128]

A. I can state that there was an odor which gave me the impression of being similar to alcohol.

Q. You have had experience,—strike that—how

(Testimony of R. B. Lindsey.)

many years have you been practicing as a physician and surgeon? A. Thirteen years.

Q. And you have had experience with alcoholism? A. Yes, sir.

Q. Had experience with the odor of alcohol?

A. Yes, sir.

Q. To what extent were you able to detect the odors of alcohol from the source which you testified to, in your opinion?

A. State that again, will you please?

Q. To what extent, that is, whether or not the odor was strong or weak?

A. I would say it was moderate.

Q. What do you mean by moderate?

A. In detecting the odors of alcohol you have several ways of determining the strength of the odor,—whether you can detect exactly what the alcoholic content was or where it came from or whether it is rather obscure and not predominant in any one respect.

Q. Then there was a pronounced smell of alcohol, an odor of alcohol?

A. There was an evident odor. [129]

Mr. Smith: That is all.

Redirect Examination

By Mr. Davis:

Q. Did you make any chemical analysis of the contents of this lady's stomach?

A. No, because I was interested in only whether the contents contained blood.

(Testimony of R. B. Lindsey.)

Q. Did you mean to say that the lady had been drinking intoxicating liquor?

A. No, I didn't make that statement.

Q. Then alcoholic odor can come from a person's stomach content without their drinking intoxicating liquor?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. Yes, it may.

Q. And that might be the cause here in this case? A. Yes, sir.

Q. Did you mean to say, or do you say now that this lady had been drinking intoxicating liquor?

A. No, sir.

Mr. Davis: That is all, Doctor.

Recross Examination

By Mr. Smith:

Q. And you did not mean to testify that she had not been drinking alcohol beverages.

A. I am not forming any opinion on that. [130]

Q. You say that the odor might come from the contents of the stomach without any alcoholic beverage?

A. Yes, sir, since you put it beverage, yes.

Q. Do you say—

A. —alcohol or an alcoholic odor may come from medicine for one thing—

Q. —Do you know whether she had any medicine or not? A No, sir, I don't know.

Q. She was your patient?

A. Three months before for a minor cold.

(Testimony of R. B. Lindsey.)

Q. She had no occasion to visit you during the intervening three months? A. No, sir.

Q. There was a definite alcoholic odor on her breath?

A. Well, I would interpret the odor as that, I guess.

Mr. Smith: That is all.

Mr. Davis: Yes, that's all.

ALTON P. BUNDERSON,

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Alton P. Bunderson.

Q. Where do you reside?

A. Paris, Idaho. [131]

Q. How long have you resided there?

A. Five years.

Q. What position do you hold in Bear Lake County, if any, that is, official position?

A. Sheriff.

Q. Were you the Sheriff of Bear Lake County on September 11, 1942? A. Yes, sir.

Q. Prior to the time you became Sheriff had you had any experience in police work?

(Testimony of Alton P. Bunderson.)

A. Yes, sir.

Q. What was that?

A. On the State Police force.

Q. How long were you a State police?

A. Two years prior to that.

Q. Did you attend any officer's school, or what they term training schools, as an officer?

A. Yes, sir.

Q. When you were a State Police?

A. Yes, sir.

Q. Did you ever see the gentleman sitting there by Mr. Merrill, reading the transcript?

A. Yes, sir.

Q. Where did you first see him?

A. In Montpelier.

Q. When did you first see him Mr. Bunderson?

A. I think it was about the 13th of September, 1942.

Q. Did he introduce himself to you?

A. Yes, sir.

Q. Who did he say he was?

A. He passed me his card introducing himself and said that he was a representative of the Tobacco Company.

Q. That card was introduced in evidence here before

A. Yes, sir.

Q. The Bailiff has handed you a card, now, Mr. Bunderson, was that the card that was handed to you by this man?

A. Yes, sir.

Q. By the gentleman sitting here?

A. Yes, sir.

(Testimony of Alton P. Bunderson.)

Mr. Davis: We ask that it be marked as an exhibit.

The Court: It may be marked as Exhibit 1.

Mr. Davis: I offer Exhibit 1 in evidence at this time.

Mr. Smith: We have no objection.

The Court: It may be admitted.

Q. At about that time did you see Mr. Rulon D. Hair who sits here by Mr. Black, his counsel?

A. Yes, sir.

Q. Where did you see him?

A. At Montpelier.

Q. What time of day was that?

A. That was in the evening. [133]

Q. Did Mr. Donnelly make any statement to you as to why he came to Montpelier, and what he was doing there?

A. I don't remember.

Q. During that day were you advised of an accident on the highway?

A. Yes, sir.

Q. Where were you when you were advised of that?

A. In front of the Police Station in Montpelier.

Q. What time of the day was that, approximately?

A. A little after five.

Q. What did you do?

A. I went to the scene of the accident.

Q. Where was the scene of the accident?

A. Approximately eighteen or twenty miles from Montpelier, north, on the highway.

Q. When did you,—strike that please,—what

(Testimony of Alton P. Bunderson.)

did you find when you got to the scene of the accident?

A. I found an automobile on its back.

Q. On its back? A. Yes, sir.

Q. What kind of automobile was it?

A. It was a 19— well, I don't know the year, but it was a Chevrolet.

Q. Truck or passenger car?

A. A panel job.

Q. What was the contents of that panel job, what was in it or what had been in it? [134]

A. Tobacco.

Q. Was there any writing or printing on it?

A. Yes, sir.

Q. Do you recall what it was? A. No, sir.

Q. Did you have some pictures taken of that truck? A. Yes, sir.

Q. When was that? A. The next day.

Q. Where was that, where were they taken?

A. At Montpelier.

Q. Would you recognize those pictures?

A. Yes, sir, if I saw them I would.

Q. Now, do you know what was done with the truck from the time you saw it on its back until this picture was taken?

A. Do I know what was done with it?

Q. Yes, was it moved? A. Yes, sir.

Q. Where to? A. Montpelier.

Q. The picture which you have in your hand is that one of the pictures that you requested to be taken? A. Yes, sir.

(Testimony of Alton P. Bunderson.)

Q. And was taken the next day after the accident? A. Yes, sir.

Q. Is that a fair representation and likeness of the truck [135] that you found at the scene of the accident?

Mr. Merrill: Objected to as leading and no proper foundation is laid, and it calls for a conclusion.

The Court: Sustained.

Q. Is that a picture of the truck which was found by the roadside, up-side-down, and moved to Montpelier?

Mr. Merrill: Objected to on the same ground, it is leading and calls for a conclusion and it is entirely without foundation.

The Court: He may answer.

Mr. Davis: Did the Court rule?

The Court: He may answer.

A. Yes, sir.

Mr. Davis: We offer this picture in evidence and I can say to the Court that it will be connected up.

Mr. Merrill: Objected to as there is no proper foundation laid for such evidence.

The Court: I will sustain the objection.

You may offer it again after you have connected it up.

Q. Now, Mr. Bunderson, who did you request to take the pictures which are marked two, three and four?

(Testimony of Alton P. Bunderson.)

A. Mr. Grey, the local photographer at Montpelier.

Q. Do you know where the truck was when they were taken?

A. At the Ford Garage at Montpelier.

Q. And were those pictures then given to you?

A. Yes, sir. [136]

Q. When you arrived at the scene of the accident what did you do?

A. I first looked the automobile over to see if there was anybody around and then continued my investigation.

Q. Who was with you?

A. Mr. Bruce and Mr. Coughlan.

Q. Did you make any measurements on that examination? A. Yes, sir.

Q. What were the measurements made with?

A. Tape.

Q. What kind of a tape?

A. Steel tape.

Q. Were the tracks leading to the scene of the accident plainly visible? A. Yes, sir.

Q. What kind of road was it? A. Oil.

Q. Who helped you with the measurements?

A. Mr. Bruce.

Q. Was the road straight at that place?

A. It was straight, yes.

Q. For how far,—for what distance was it straight?

A. For a half mile both ways from the truck.

(Testimony of Alton P. Bunderson.)

Q. Was there anything to obstruct the view of the driver?

A. Only that the road is a little wavey,—up and down.

Q. At the time you made the measurements, did you set down [137] the measurements on a rough plat?

A. Yes, sir.

Q. While you were at the scene of the accident?

A. Yes, sir.

Mr. Davis: We ask to have the plat marked as Exhibit 5.

The Court: Yes, it may be so marked.

Q. Are you familiar with what I have had marked as Exhibit 5 without having it handed to you?

A. Yes, I think so.

Q. Mr. Bunderson, when was this drawing on this exhibit made, when were these made?

A. At the time I measured the distances.

Q. And when were the distances put down?

A. At the same time.

Q. Where did you commence the measurement,—that is, where did you commence measuring from the point where you found the automobile?

A. North.

Q. The automobile was traveling in what direction?

A. South.

Q. What did the tracks show? What was the first thing you saw in reference to the tracks commencing north from the scene of the accident?

A. From the automobile I walked up the road to where the tracks left the oil.

(Testimony of Alton P. Bunderson.)

Q. That is where you started to measure? [138]

A. Yes, sir.

Q. What did the tracks show from there? Which side of the road did they leave?

A. The west side.

Q. How far did they travel off the oil?

A. I don't know.

Q. You mean that you would have to exhibit to state? A. Yes, I would.

Q. Now, how far did the tracks travel off the oil?

A. 117 feet.

Q. When they left the oil first?

A. Yes, sir.

Q. What was the course of the tracks then?

A. They came back on the oil and stayed on the oil, crossed it, 177 feet and then left the east side and stayed off the oil again for 166 feet, and then came back on the oil and stayed on the oil for 146 feet, going off the west side again and stayed off for 66 feet and then came back on the oil and stayed on the oil for a distance of 92 feet.

Q. Then when they left the oil after this distance of 92 feet where did the tracks go then?

A. Down into the borrow-pit, and then out in the open country there.

Q. What distance?

A. Eighty-two feet. [139]

Q. What did you find at the end of that distance? A. The automobile.

Q. Were these tracks plainly visible?

A. Yes, sir.

(Testimony of Alton P. Bunderson.)

Q. Did they remain visible for some time?

A. Yes, sir.

Q. How long did they remain visible?

A. They were there when I left.

Q. Were they still visible at a later date?

A. I never noticed.

Q. During the time you made this examination did Mr. Hair appear there? A. Yes, sir.

Q. Where was he?

A. He came with the wrecker.

Q. Were you making the examination and measurements while he was there? A. No, sir.

Q. Had you completed them? A. Yes, sir.

Q. Did you have a discussion with him at that time at all?

A. I talked to him but I don't know now what we talked about.

Q. Was there any discussion as to why you were there? A. Not that I remember.

Q. You don't recall whether you told him that you made measurements? [140] A. No, sir.

Q. What did you do as to any property there at the scene of the accident?

A. We uprighted the car and gathered up the merchandise and throwed it back in the truck.

Q. What was that merchandise?

A. There was cigarettes and chewing tobacco.

Q. What kind of cigarettes? A. Camels.

Q. Do you recall what kind of chewing tobacco it was? A. No, I don't.

(Testimony of Alton P. Bunderson.)

Q. What was the fact as to whether car was loaded or not? A. Yes, it was.

Q. It was loaded. A. Yes, sir.

Mr. Davis: Now I would like to point out to the witness different markings on this exhibit. May I approach the witness?

The Court: Yes, you may do that.

Q. Mr. Bunderson, starting here at the two there are two figures,—there are three figures 238; 123 and 714—did you make those? A. Yes, sir.

Q. Here are the figures 238 and the word steps. Did you make those figures and put the word on there? A. Yes, sir. [141]

Q. 640 here (indicating). Did you make that?

A. Yes, sir.

Q. What was that, or what does it indicate?

A. That was the time I finished the investigation.

Q. Right here is the following: “all done with the investigation 9-11-42.” Did you put that there?

A. Yes, sir.

Q. And “twenty miles north of Montpelier.” That is in your hand writing? A. Yes, sir.

Q. License Number 3A150 C 1941 Chevrolet. Are those also your figures? A. Yes, sir.

Mr. Merrill: We must object to these leading questions.

The Court: I understood that he was just identifying the exhibit.

Mr. Merrill: He can do that without these leading questions.

(Testimony of Alton P. Bunderson.)

The Court: Proceed, Mr. Davis, without leading the witness.

Q. Here is some writing here (indicating). Did you write that? A. Yes, sir.

Q. What is that?

A. Culvert 100 650 414 plus 15. [142]

Q. Is that your writing? A. Yes, sir.

Q. You wrote it, did you? A. Yes, sir.

Q. Here is an illustration, who made that?

A. I did.

Q. What is that?

A. That is the way I diagram an automobile.

Q. Does that cover the writing you can see here (indicating). A. Yes, sir.

Q. And what is that, Mr. Bunderson?

A. That is an arrow pointing north and the word north.

Q. These two lines; what do they represent?

A. The edge of the oil. The width of the oil road.

Q. The figure here (indicating) and line running this way. What does that represent?

A. That is 117 feet.

Q. And what does that represent?

A. The measurement from the first time it left the oil until it returned to the oil.

Q. Does it indicate the Course of the road or not? A. No, sir; it does not.

Q. Do you see any other marking that you have not explained?

(Testimony of Alton P. Bunderson.)

A. No, I don't think so. I believe that's all.

Q. Now will you explain why you used this paper. How you happened to use this piece of paper for making this diagram? [143]

A. Yes, I can explain that.

Q. Why was it?

A. That was the only piece of paper I had in the automobile to make any diagram on at that time.

Q. That is not made to scale, is it?

A. No, sir.

Q. Mr. Davis: We offer this exhibit in evidence at this time as exhibit 5.

Mr. Merrill: It is objected to as incompetent, irrelevant and immaterial and not properly identified and not proper to be admitted; it is not an accurate representation of things on the ground; and contains considerable matter pertaining to things not having to do with this controversy. Particularly the matters on the back of the piece of paper.

The Court: It may be admitted, but in admitting this there are certain printings in red on the back which are not to be considered by the jury as they have nothing to do with the matter before you at this time.

Q. Mr. Bunderson, in explaining the drawing would it be easier, if you are permitted to explain it from a larger plat, one on which you can point out the objects and the measurements rather than the one just admitted in evidence?

(Testimony of Alton P. Bunderson.)

A. I think so.

Q. Now you have been handed exhibit marked 6. Did you prepare that? [144]

A. No, sir.

Q. For the purpose of illustration is that clearer and would you be better able to explain that measurement and the course of the car from the drawing that is now in your hands?

Mr. Merrill: Objected to as calling for a conclusion of the witness. The evidence already shows that it is a purported enlargement of the exhibit introduced. It is wholly immaterial for any purpose. He testified that he didn't prepare it. It is simply a copy and not an original instrument.

The Court: I will permit you to examine him further on this.

Q. Does that show the distance the same as you have testified from your exhibit and does it show the course of the automobile in accordance with the distances set out in your exhibit?

Mr. Merrill: We object to that. It is immaterial and is merely an attempted re-statement of what has gone in before.

The Court: He may answer.

A. Yes, sir.

Mr. Davis: We offer this exhibit for the reason that it makes the matter more understandable and can be better explained than from the other exhibit. We offer it as a rough draft to permit the witness to [145] explain to the Court and the jury the course of the automobile in accordance with his plat.

Mr. Merrill: We object to it as not properly

(Testimony of Alton P. Bunderson.)

identified. It is only a copy of an exhibit already in evidence. There is no apparent reason for encumbering the record with it. This witness didn't prepare it. It is wholly immaterial.

The Court: The witness has testified that it does show all that is on the small exhibit. Just for the purpose of allowing the witness to explain to the jury, on the exhibit, the tracing of the course of the car. I will admit it for that purpose. It would be quite difficult to point out to the jury on the smaller map the measurements. I will permit it to be introduced for that purpose only.

Mr. Merrill: May I ask the witness a few questions regarding this exhibit?

The Court: Yes.

Q. By Mr. Merrill: You didn't prepare this?

A. No, sir.

Q. You don't know whether it is accurate or not?

A. No, sir; I don't.

Q. You don't know whether this marking of the highway is accurate or not?

A. No, sir.

Q. You don't know whether the distance off the highway shown [146] on this by these markings is correct?

A. No, sir; I don't know.

Q. You don't know anything about the scale, whether the distances are true to the scale?

A. No, sir.

Mr. Merrill: We think it is abundantly proven that it would be misleading and would be objectionable on that ground. We object on that ground as well as on the other grounds mentioned. There is

(Testimony of Alton P. Bunderson.)

considerable on there that is not on the other exhibit.

The Court: I understood you to say this was an illustration of the condition of the highway at the time and place you made the examination?

A. Yes, sir.

The Court: And the distance line showing the course of the car and the distance is correct? Rather it is the same on both exhibits?

A. Yes, the numbers are the same. I don't know about the scale.

The Court: This may be admitted as an illustration of the testimony of the witness, not as proving or disproving any issue in this case.

Q. By Mr. Davis: Now, Sheriff, if you will please come down here. Now, if you will approach this black-board and stand to one side. Will you show on the exhibit where you first commenced your measurement? [147]

A. Right here (indicating).

Q. What does that dotted line indicate?

A. I imagine the tracks I measured.

Mr. Smith: That is objected to as a conclusion of the witness and we ask that it be stricken.

The Court: It may be stricken.

Q. Show us the distance and the course that the tracks went,—the distances you have testified to.

A. (Indicating): This is the first place it left the oiled surface and it stayed off the oil for 117 feet and came back on the oil from the west side

(Testimony of Alton P. Bunderson.)

of the oil, to where it left the oil again was 177 feet and then it stayed off the oil for 166 feet and came back to cross the oil again to where it left on the west side 146 feet farther south. It stayed off the oil on the west side for 66 feet and then came back across the oil for 92 feet and then went off the other edge of the highway, the east edge, and from the east edge of the highway to where the automobile was is 82 feet.

Mr. Davis: Now you may take the stand again.

Q. Had your measurements been completed before the truck was moved? A. Yes, sir.

Q. How was it moved?

A. By the wrecker.

Q. Do you know who had the wrecker?

A. Yes, sir. [148]

Q. Who was that? A. Carl Oxenbine.

Q. Who was with Mr. Oxenbine?

A. Mr. Hair.

Q. Anyone else with Hair that you know of?

A. No, sir.

Q. When you examined the road where the tracks where the truck first went off the oil road?

A. Yes, sir.

Q. What did you find there?

A. I found the shoulder of the road was wet.

Q. What was the depth of the depression, do you know, where the car went into the ground?

A. No, sir.

Q. Was it plainly visible? A. Yes, sir.

Q. Did you examine the tracks along there?

(Testimony of Alton P. Bunderson.)

A. Yes, sir.

Q. Did you find any rocks or other objects there in the tracks? A. No, sir.

Q. You examined all the tracks carefully?

A. Yes, sir.

Q. Now, Mr. Bunderson, with reference to the pictures,—the first picture,—what is the number of that? A. This is number 4.

Q. Does that picture fairly represent and is it a fair likeness [149] of the truck you found along the highway?

Mr. Smith: Objected to as leading and it is repetition.

The Court: He may answer.

A. Yes, sir.

Mr. Davis: We now offer it in evidence.

Mr. Merrill: We object to it as not properly identified and it is immaterial.

The Court: It may be admitted.

Mr. Merrill: May I ask a question or two regarding this exhibit?

The Court: Yes, Mr. Merrill, you may ask.

Q. By Mr. Merrill: Do you know whether or not,—strike that,—do you know where this purported photograph was taken?

A. Yes, sir.

Q. Where?

A. The Ford Garage, Montpelier.

Q. Were you there? A. No, sir.

Q. Do you know whether or not it shows the true condition of that car?

(Testimony of Alton P. Bunderson.)

A. As much as I know about it, it does.

Q. Does it show the true condition?

A. So far as I know.

Q. Don't you know that the right front tire was blown out? A. No, sir. [150]

Q. Do you know that the right front tire was flat? A. Yes, sir.

Q. I call your attention to that fact, and ask you whether it shows that tire flat?

A. No, but there is a jack under it.

Q. That is the reason that it doesn't show it?

A. Yes, that's right.

Q. Anything else that is different?

A. Not that I notice.

Q. You were not there when the photograph was taken? A. No, sir.

Q. The car was then a good many miles from the scene of the accident. A. Yes, sir.

Q. Do you know how many days passed before it was taken? A. No, sir.

Q. Do you know who was there when it was taken?

A. I just know that I received the picture.

Q. And that is all you know?

A. That's all.

Q. You don't know what work had been done by the mechanics at that time? A. No, sir.

Q. Or how they had moved it around?

A. No, sir.

Q. Or whether they had been hammering on it, or working [151] on it in any way?

(Testimony of Alton P. Bunderson.)

A. No, sir.

Mr. Merrill: Now we object on the further ground, Your Honor, that it cannot be shown that this is a true representation. He admits that it is jacked up and he also admits that he wasn't there when this picture was taken.

The Court: He has testified that it was a true representation as he observed it at the time of the wreck.

Mr. Merrill: Under cross-examination he has shown that it is not a true representation.

The Court: Should your motion be to strike the exhibit at this time?

Mr. Merrill: Perhaps so. If it is introduced, I move to strike it as not a true representation and not properly identified.

The Court: I will take this under advisement and I think we will recess until 10 o'clock in the morning.

10 O'clock A.M., March 20, 1945

The Court: The motion to strike the exhibit will be overruled.

Q. Now, Mr. Bunderson, you have been handed what is marked as exhibit 5. You have heretofore stated that you requested that the pictures be taken immediately [152] after the accident.

A. The next day.

Q. Now, does that represent and is it a fair likeness of the car as it appeared at that time?

A. Yes, sir.

(Testimony of Alton P. Bunderson.)

Mr. Davis: We offer it in evidence.

Mr. Merrill: Objected to as not properly identified.

The Court: Admitted.

Mr. Davis: I think I referred to that as exhibit 5. I think I should have said exhibit 2. May that be corrected.

The Court: Yes, if it is number 2.

Mr. Davis: I would like to have number two handed to the jury and number three handed to the witness.

Q. Does that picture marked exhibit 3 represent and is it a fair representation and likeness of the car as it appeared at that time?

A. Yes, sir.

Mr. Davis: We offer that in evidence.

Mr. Merrill: The same objection as made to the former exhibit.

The Court: The same ruling.

Q. Mr. Bunderson, have you had occasion to become familiar with and have you traveled the road between Montpelier [153] and Soda Springs the last few years? A. Yes, sir.

Q. Are you familiar with the highway from what is called the underpass, east of Soda Springs, over to Montpelier? A. Yes, sir.

Q. What is the fact as to whether there are any main roads crossing the highway this underpass and the point of the accident?

A. Not that I know of.

Mr. Davis: That's all, Mr. Bunderson.

(Testimony of Alton P. Bunderson.)

Cross-Examination

By Mr. Merrill:

Q. Do you know what counsel meant by main roads?

A. I understand main roads to be other than farm roads.

Q. But there are a number of those roads.

A. Yes, sir.

Q. There are a number of side-roads leading off to various properties along the highway?

A. Yes, sir.

Q. They were scattered all along there?

A. Yes, sir.

Q. Some of them graveled roads?

A. Yes, sir.

Q. Very well defined roads? A. Yes, sir.

Q. How far is the underpass from Soda Springs? [154]

A. I would say about a mile or a mile and a half.

Q. How far was the scene of the accident from the underpass?

A. I estimate it about six or seven miles.

Q. Do you know how far the County line is from Soda Springs? A. No, sir.

Q. You never made any study of that?

A. No, sir.

Q. Don't you know it is about ten or twelve miles from Soda Springs? A. Could be.

Q. This accident happened near the County line, just over the County line?

(Testimony of Alton P. Bunderson.)

A. A couple of miles over.

Q. You never made any examination as to where it was,—that is, the distance from the underpass to the county line?

A. I estimated it about seven miles but it could be more.

Q. I am calling your attention to exhibit 5. Do you know what that is?

A. Yes, sir.

Q. What is it?

A. Sketch of the place of the accident?

Q. Made by you?

A. Yes, sir.

Q. When did you make it?

A. At the time I was investigating,—investigating the accident. [155]

Q. What did you do with the sketch?

A. I kept it in my car.

Q. Did you ever make a copy of it and send it to the State Department of law enforcement?

A. I think I did.

Q. Do you know that you did?

A. I can't remember that.

Q. Did you keep a copy in your office?

A. I don't remember.

Q. Isn't it common practice to keep a copy?

A. Either notes or a copy.

Q. Did you keep a copy in this instance of what you sent to the State Department?

A. I don't remember.

Q. What time of the day did you get out to the scene of the accident?

A. I would say around five o'clock.

(Testimony of Alton P. Bunderson.)

Q. What time did you say the accident happened? A. I wouldn't know.

Q. Did you make a report as to the time of the accident? A. Not as to the time.

Q. Following the accident you made a report?

A. Yes, I did.

Q. What did you say in that report as to the time of the accident? A. I can't remember.

Q. You can't remember. A. No sir.

Q. You know that it was at 4:30.

A. I don't know that.

Q. Who went out with you to the scene of the accident?

A. Mr. Willard Bruce and Mr. Glen Coughlan.

Q. Glen Coughlan is one of the attorneys for the plaintiffs, who is not here at this time?

A. Yes sir.

Q. Did Mr. Coughlan assist you in making this sketch, exhibit number 5?

A. No, I don't think he did.

Q. He was there? A. Yes sir.

Q. And discussed it with you?

A. Yes sir.

Q. Did he help step off these measurements?

A. No sir.

Q. Who stepped off these measurements?

A. I did.

Q. You did. A. Yes sir.

Q. How many feet do you take to the step?

A. I wouldn't know.

(Testimony of Alton P. Bunderson.)

Q. You have on this map, exhibit 5, 238 steps, what does it mean? [157]

A. That means the steps I took between the point of where the car left the highway first, and last left the highway.

Q. Did you step this 177,—that means steps or feet? A. Feet.

Q. Did you step that off? A. No sir.

Q. Why did you put 238 steps on this map?

A. After I made the measurements I walked down the road, I took the number of steps as I walked down there and I put that notation down.

Q. Why didn't you measure it?

A. I didn't think it was essential as far as the investigation was concerned.

Q. Was there a yellow line on this highway?

A. Yes sir.

Q. All the way? A. Yes sir.

Q. When did you come to that conclusion?

A. After the last Court.

Q. Is that line all the way from Soda Springs to Montpelier? A. No sir.

Q. Where is this yellow line?

A. The center of the road.

Q. What distance? A. I don't know.

Q. That is a straight road? [158]

A. Yes sir.

Q. It is several miles from any town?

A. Yes sir.

Q. What reason can you ascribe for the yellow line? A. They do it all over the state.

(Testimony of Alton P. Bunderson.)

Q. Why in an outlying road like that?

A. I don't know.

Q. Why didn't they do it the whole distance?

A. I don't know.

Q. Why was the yellow line at this spot?

A. I don't know.

Q. What was the charatcer of the road at this spot? A. Hilly.

Q. Was it level or did it have raises and curves?

A. It was straight but up and down.

Q. What do you mean by that?

A. It was wavey, up and down.

Q. It has crests, and for about a half mile there it was up and down? A. Yes sir.

Q. So it wasn't level during that space or distance there? A. No sir.

Q. How deep were these basins in between the crests? A. I don't know.

Q. You didn't give that any consideration?

A. No. [159]

Q. If an automobile was down in the bottom of one of these basins could anyone over the crest see it? A. I think you could.

Q. Did you make such an investigation?

A. No sir.

Q. Did you measure the width of the highway?

A. Yes sir.

Q. How wide is it?

A. Eighteen feet eight inches.

Q. How much of that was oil?

A. That is the oil.

(Testimony of Alton P. Bunderson.)

Q. The eighteen feet eight inches is oil?

A. Yes sir.

Q. How wide were the shoulders?

A. The shoulders?

Q. Yes, from the edge of the oil to the edge of the shoulder.

A. About five feet.

Q. On each side.

A. Yes sir.

Q. Of what were the shoulders constructed?

A. Gravel surface.

Q. Did you examine these shoulders?

A. Yes sir.

Q. Did you observe in the shoulders that there were ruts?

A. No sir.

Q. Didn't you observe any ruts at all, or indications of a car having come along on the shoulder and made an [160] impression along that shoulder?

A. Yes sir.

Q. How deep were those impressions?

A. I don't know.

Q. Two or three inches?

A. I wouldn't say.

Q. There was quite a marked indication of a car wheel having been along there?

A. Yes sir.

Q. It had been raining.

A. Yes sir.

Q. That was along the west side?

A. Both sides.

Q. Along the west side how far was it that the wheel had made an impression in the soft shoulder?

A. I think 177 feet if I remember that.

(Testimony of Alton P. Bunderson.)

Q. That first one was how far?

A. I don't know. It is on the plat there.

Q. Is the 117 feet? A. I guess it is.

Q. During that 117 feet there was a perceptible indentation showing a car wheel to have been traveling along an impressed rut in the shoulder?

A. Yes sir.

Q. That was observable to have been made by this particular car? [161] A. Yes sir.

Q. It was raining and muddy?

A. It had been raining.

Q. It was muddy? A. Yes sir.

Q. The oil is much harder than the soft shoulder? A. Yes sir.

Q. There is a perceptible hardness on the oiled portion of the road as you come from the shoulder onto the oiled portion? A. Yes sir.

Q. Sometimes that is rugged? A. Yes sir.

Q. You observed tracks along the roadway on the shoulder? A. Yes sir.

Q. Your wheel went,—strike that,—the wheel then went on the oiled portion of the road?

A. Yes sir.

Q. And if it got off it made this track again?

A. Yes sir.

Q. Have you observed, or did you observe at the time of your examination of the car that the right front wheel had a blown out tire?

A. It was down, I don't know what happened to it.

Q. Your examination didn't go that far?

(Testimony of Alton P. Bunderson.)

A. No sir, I wouldn't have known what caused it. [162]

Q. Did you examine the car?

A. I looked at it.

Q. You saw this wheel was flat?

A. Yes sir.

Q. I mean the tire? A. Yes sir.

Q. That was the right front tire?

A. Yes sir.

Q. How long were you out there at that time?

A. I would say approximately an hour or an hour and a quarter.

Q. You and Mr. Coughlan and Mr. Bruce?

Q. Mr. Hair came out with Mr. Oxenbine?

A. Yes sir.

Q. While you were there? A. Yes sir.

Q. And they looked over the scene?

A. Yes, sir.

Q. You know Mr. Oxenbine? A. Yes, sir.

Q. He examined the car?

A. He looked the car over.

Q. Did you see them take the car back?

A. Yes, sir.

Q. To Montpelier? A. Yes, sir.

Q. Did you stay until after the car was taken or did you [163] leave before they did?

A. I think I left after.

Q. How long after? A. I don't know.

Q. Did you go out with Mr. Coughlan or did he go with you? A. He went with me.

Q. Whose car did you drive? A. My own.

(Testimony of Alton P. Bunderson.)

Q. I think you said that you had some discussion with Mr. Donnelly about this accident?

A. Yes, sir.

Q. Where did you have this discussion?

A. I don't remember but I think in the police station for one place.

Q. Where is the police station?

A. The police station in Montpelier.

Q. Whereabouts in Montpelier, is it in the City building?

A. No, it is a building back of Mack's cafe.

Q. When did you have this conversation?

A. I think it was the 13th.

Q. Was that the time he handed you his card as you said?

A. Yes, sir.

Q. Did you discuss the accident at that time?

A. Yes, sir.

Q. You had made out some reports?

A. Yes, sir. [164]

Q. We are handing you proposed defendant's exhibit 8, does that bear your signature?

A. Yes, sir.

Q. It is not a complete report is it?

A. No, sir.

Q. Did you send that report in to the State Department?

A. I think I did.

Q. Did you send one like it?

A. I think so.

Q. Was it an exact duplication of that report or did you have something else on it?

A. I think I sent two in.

(Testimony of Alton P. Bunderson.)

Q. You are handed defendant's exhibit 7, and I will ask you if you know what that is?

A. Yes, sir.

Q. What is it?

A. That is a report of the wreck.

Q. Did you send the original of that to the Department? A. Yes, sir.

Q. Now, Sheriff, when were these reports made out?

A. I believe it was the next day. The 12th of September.

Q. Who was present when they were made out?

A. Mr. Hair and Mr. Dunn.

Q. Who is Mr. Dunn?

A. City Police Officer and myself.

Q. The three of you made out the report? [165]

A. Just the two of us.

Q. Mr. Dunn had nothing to do with it?

A. No, sir.

Q. These are exact copies of the reports you sent to the State Department?

A. This one is.

Q. What do you mean when you say this one,—

A. Well I think I sent the original of this report, the original on number 7 but I am not sure about this.

Q. These are exact copies. You had a copy in your office? A. Yes, sir.

Q. They were in your office for a long time?

A. Yes, sir.

(Testimony of Alton P. Bunderson.)

Q. They represent what you thought to be the cause of the accident at that time?

A. Yes, sir.

Mr. Merrill: We offer exhibits 6 and 7 in evidence.

Mr. Davis: I think they are exhibits 7 and 8.

Mr. Merrill: Yes, 7 and 8.

Mr. Davis: No objection.

The Court: They may be admitted.

Mr. Merrill: I will want to read portions of this exhibit, perhaps not now, but I don't want the statute to go against me on this.

The Court: It might be agreeable to stipulate.

Mr. Davis: It is agreeable with me that he can read it at any time he wants and he may read any part he wants.

Q. These blanks are blanks provided for the Sheriffs by the State department of law enforcement?

A. Yes, sir.

Q. They were furnished to you?

A. Yes, sir.

Mr. Merrill: Now I will read a part of this exhibit 7. On this exhibit there appears the following: "Describe the accident. Also use this space for data on third vehicle. Additional witnesses or injured persons and explanation of questions not fully answered by checking in the boxes provided. While traveling south on highway 30 N. and 22 miles north of Montpelier I met a semi-truck trailer riding a little over the yellow line, in order to pass I rode my two right wheels on the

(Testimony of Alton P. Bunderson.)

shoulder which was soft with rain which put my car out of control. While it was out of control I hit a rock blowing my right front tire and causing my car to roll over. Signature R. D. Hair”.

Q. Now, did Mr. Donnelly ask you how the accident happened?

A. I don't remember what was said about that.

Q. Did he ask you how the accident happened?

A. I imagine he did but I don't remember that.

Q. Where did you have the conversation with him? [167]

A. I had several. I talked to Mr. Donnelly three or four times.

Q. That is what I want to know. You said that you had a conversation with him on the 13th of September? A. Yes, sir.

Q. Where was that conversation?

A. I think at the police station.

Q. What other conversation did you have?

A. I don't remember that.

Q. Did you have others?

A. Yes, I talked and visited with him.

Q. Whereabouts?

A. In two or three places.

Q. You don't remember anything as to what was said in any of those places? A. No, sir.

Q. Who was present at the police station besides yourself and Mr. Dunn.—was Mr. Dunn present when Mr. Donnelly was there?

A. I don't remember that.

(Testimony of Alton P. Bunderson.)

Q. Do you remember whether the Chief of police was present? A. No, sir, I don't.

Q. Well, now Sheriff, didn't Mr. Donnelly ask you your version of the accident, how it happened?

A. Not that I remember.

Q. Didn't he ask you how the accident happened? [168]

A. He might have done but I don't remember anything about that, I know we talked about the accident.

Q. What did you talk about?

A. About the accident.

Q. Did he ask you how it happened?

A. I don't remember that.

Q. Did he ask you if you had been out to see the car? A. I don't remember that.

Q. Did he ask if you had been to the scene of the accident?

A. I don't remember that either.

Q. Well, what did he ask you?

A. I don't remember what he said but I know that we talked about the wreck.

Q. Isn't it true at that time and place, on Sunday the 13th of September 1942 in the afternoon of the day at the office of the Chief of Police in Montpelier, yourself and Mr. Donnelly being present; among other things Mr. Donnelly asked you how the accident happened and what caused the accident, to which you replied: "from looking over the tracks the car made it looked like the car had been crowded off the road on the soft shoulder and

(Testimony of Alton P. Bunderson.)

while Mr. Hair was trying to control the car while being on the soft shoulder, the right front tire had apparently hit a sharp object which threw the truck out of control from there on east until the car turned over." Didn't you tell him that at that time and place? [169]

A. No, sir, not that I remember.

Q. Would you say that you did or didn't?

A. I had no reason to say that.

Q. I am not asking that.

A. But I had no reason to say that.

Q. Would you say that you didn't?

A. I would say that I didn't.

Q. Did Mr. Donnelly ask about the accident?

A. Yes, sir.

Q. What did you tell him?

A. I don't remember.

Q. How do you remember other matter connected with this?

A. Conversations are rather hard to remember.

Q. You, as an officer, went out to make an examination of the accident? A. Yes, sir.

Q. And to gather the facts concerning it?

A. Yes, sir.

Q. Did you do your duty? A. I tried.

Q. You came back and were interviewed by someone interested in the matter?

A. Yes, sir.

Q. And he asked you about it?

A. Yes, sir. [170]

(Testimony of Alton P. Bunderson.)

Q. What did you tell him?

A. I don't remember.

Q. You haven't any recollection of having told him anything?

A. No sir, I didn't write it down.

Q. You sent it to the Department.

A. Not what Mr. Donnelly and I talked about.

Q. You sent to the Department a report containing in substance what Mr. Donnelly said to you and the things you said to him? A. No sir.

Q. Didn't you send a statement to the Department containing this: "While traveling south on Highway 30 North, and 22 miles north of Montpelier I met a semi-truck trailer riding a little over the yellow line. In order to pass I rode my two right wheels on the shoulder which was soft with rain which put my car out of control. While it was out of control I hit a rock blowing my right front tire and causing my car to roll over."

A. Yes sir.

Q. Now, that was your version of the accident?

A. That was Mr. Hair's version.

Q. You had an opinion of what the investigation showed? A. Yes sir.

Q. You had the information gained from the examination? A. Yes sir.

Q. You had that information when Mr. Donnelly talked to [171] you? A. Yes sir.

Q. And Mr. Donnelly asked about the accident?

A. I think he did.

Q. And how it happened? A. He might.

(Testimony of Alton P. Bunderson.)

Q. Now, do you remember having told him what I read to you? A. No sir.

Q. Isn't it likely that you told him what you transmitted to the State Department of Law Enforcement? A. I could have, yes.

Q. Isn't it likely that you told him the same story? A. Yes sir.

Q. Didn't you tell him what I read to you?

A. Not that I remember.

Q. What did you tell him?

A. I don't remember telling him that.

Q. Mr. Coughlin was with you on that day?

A. Yes sir.

Q. He is a close personal friend of yours.

A. Yes sir.

Q. He is the prosecuting attorney and you are the Sheriff? A. Yes sir.

Q. Of Bear Lake County? A. Yes sir.

Q. You have reviewed this a great deal since that time? [172] A. Very little.

Q. You have gone over it with the attorney for the plaintiffs? A. Yes sir.

Q. But you don't remember what was said to Mr. Donnelly? A. No sir.

Q. Except what you testified to on Direct examination? A. Yes sir, that's right.

Q. You don't remember telling Mr. Donnelly what I read to you? A. No sir.

Q. Do you know what a truck with a trailer is?

A. Yes sir.

Q. A semi-truck with trailer? A. Yes sir.

(Testimony of Alton P. Bunderson.)

Q. How wide are those vehicles?

A. Most of them are eight feet.

Q. If one of such vehicles was straddle the yellow line there wouldn't be much of the highway left?

A. No sir.

Q. If it was traveling north and met a car going south, it would be essential that the south traveling car be pushed off on the soft shoulder?

A. Yes sir.

Q. Now, Mr. Bunderson, you made an investigation showing the speed of the car?

A. Yes sir. [173]

Q. What did your investigation show as to the speed. I mean the speed of the Hair car?

A. I don't know. It is on my report.

Q. I hand you defendant's exhibit 8 that is the report you signed yourself I think.

A. Yes sir.

Q. Tell me from that what the speed of the Hair car was?

A. At the time of the accident or before?

Q. Both.

A. I marked the estimated speed before the accident at 40 miles an hour, and estimated speed at the moment of the accident at 30 miles an hour and the lawful speed at 40 miles an hour and the maximum speed under conditions prevailing 50 miles an hour.

Q. That was your report made to the department?

A. Yes sir.

Q. That was the fact as you discovered it then?

A. Yes sir.

(Testimony of Alton P. Bunderson.)

Q. And that is your understanding of it now?

A. Yes sir.

Mr. Merrill: That is all, you may take the witness.

Redirect Examination

By Mr. Davis:

Q. Did you make your investigation for the purpose of giving your version of this accident or giving the [174] physical facts as they appeared on the ground? A. The physical facts.

Q. Now, did Mr. Coughlan influence you in this matter?

Mr. Merrill: Objected to as calling for a conclusion of the witness?

The Court: He may answer.

A. No sir,

Q. Did Mr. Coughlan try to get you to do anything that wasn't in accordance with the facts?

A. No sir.

Mr. Merrill: That is objected to as leading and calling for a conclusion of the witness.

The Court: He has answered and it may stand.

Q. Mr. Coughlan was County attorney at that time? A. Yes sir.

Q. Where is Mr. Coughlan now?

A. I understand he is at Pearl Harbor.

Mr. Merrill: Objected to as immaterial.

A. The last word I had was that he was at Pearl Harbor.

Q. Who is he working for?

Mr. Merrill: Objected to as immaterial and calls for a conclusion and is prejudicial.

(Testimony of Alton P. Bunderson.)

The Court: I think you brought out that he was connected with this investigation. He may answer.

A. He is in the Navy. [175]

Q. Now, Mr. Bunderson, were the shoulders of this road any softer on one side than on the other?

A. Not that I noticed.

Q. Was the depression or impression that was made on the shoulders where the truck went off each side of the road the same, were they similar?

A. Yes sir.

Q. Was the oil any harder or more rugged on one side of the road than the other?

A. No sir.

Q. Now, Mr. Bunderson these reports exhibits 7 and 8 that were handed to you. This part of the writing here (indicating) that counsel read to the jury from this exhibit, whose hand writing is that in?

A. Mr. Hair's.

Q. Who is that signed that, right here, who is that signed by?

A. Mr. Hair.

Q. Did you write that at all?

A. No sir.

Q. Was that your version of how the accident happened?

A. No sir.

Mr. Merrill: Objected to, it would contradict the report he sent in.

The Court: He has answered the question.

Q. Did you give any measurements?

A. I think I did, yes sir. [176]

Q. Who gave you the information as to the speed that the car was going? I mean the speed prior to the accident?

A. Mr. Hair.

(Testimony of Alton P. Bunderson.)

Q. Who gave you the information as to the speed of the car at the time of the accident?

A. Mr. Hair.

Q. When you make a report is it customary for you to permit the participant to describe the accident in his own words? A. Yes sir.

Q. That doesn't mean that you approve of that?

Mr. Merrill: Objected to as leading and argumentative.

The Court: He may answer.

A. Oh. No.

Q. Did you intend to testify that you believed that, or that you made this report in accordance with what Mr. Hair stated here?

Mr. Merrill: Objected to as leading and calling for a conclusion and immaterial.

The Court: He may answer.

A. No sir.

Q. Is that your version of how the accident happened?

Mr. Merrill: We object to that as calling for a conclusion of the witness. It is leading and it attempts to put in evidence contrary to the report he made to the Department of law enforcement.

The Court: He may answer.

A. No sir.

Q. You were asked on cross examination that if a semi-trailer came along and certain things happened,—now do you know that a semi-trailer came along? A. No sir.

Q. Do you believe one did?

(Testimony of Alton P. Bunderson.)

Mr. Merrill: That is objected to as calling for a conclusion of the witness and it is a matter for the jury to determine.

The Court: That is a question of fact for the jury.

Q. Did Mr. Hair make any request of you to apprehend or find the person that drove that semi-trailer and truck? A. No sir.

Q. Did he ask to have that person arrested?

A. No sir.

Q. Did he give you any description of that truck? A. No sir.

Q. Were you ever asked by anyone to look for a semi-trailer or to find a semi-trailer and truck in connection with this accident? A. No sir.

Q. Now, Mr. Bunderson, you have been asked to state what Mr. Donnelly said and what you said. I will ask you if Mr. Donnelly was interested in any way with reference [178] to Mr. Hair's custody, if he told you at any time?

Mr. Merrill: Objected to as it calls for a conclusion of the witness and it is improper redirect examination.

The Court: It was gone into, he may answer.

A. No sir.

Q. I will ask you if the fact isn't that Mr. Donnelly told you that if you arrested Mr. Hair that he would be responsible for his appearance?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, leading and he has already answer that he didn't so ask him.

(Testimony of Alton P. Bunderson.)

The Court: He may answer.

A. Not that I remember.

Q. Was there some discussion about Mr. Hair being released after the accident?

Mr. Merrill: Objected to as leading.

The Court: Yes, it is leading but he may answer.

A. Not that I remember of.

Q. Now, Mr. Bunderson, do you now attempt to say or have you at any time attempted to say or do you mean by any report that you have filed that you intend to make the statement as to how this accident happened or what caused this truck to tip over?

Mr. Merrill: Objected to as leading, calling [179] for a conclusion of the witness and usurps the function of the jury.

The Court: I think he may answer.

A. No sir.

Q. You just made the measurements and reported what you found out there, the physical facts.

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. Yes sir.

Mr. Davis: That is all.

Recross Examination

By Mr. Merrill:

Q. I believe you said that Mr. Coughlan was County Attorney at the time this accident happened?

A. Yes sir.

(Testimony of Alton P. Bunderson.)

Q. Is that a fact or is it a fact that Darwin Haddock was the County attorney at that time?

A. Well, now, I don't remember.

Q. Isn't it a fact that Darwin Haddock was County Attorney until the end of 1942 and that Mr. Coughlan was elected at the November election?

A. Did we have an election that fall?

Q. I am wanting to know if it wasn't a fact that Mr. Haddock was the County attorney or that you were out there with Mr. Coughlan the Prosecuting attorney?

A. I cannot say for sure.

Q. You don't know much about any of this?

A. No sir.

Mr. Merrill: That is all.

Redirect Examination

By Mr. Davis:

Q. You know that the figures you gave on that plat or map and shown there are true and correct figures of the distances you found at that time?

A. Yes sir.

Mr. Merrill: Objected as repetition.

The Court: It may be, but the answer is in and it may stand.

Mr. Davis: That is all.

The Court: We will recess for ten minutes.

10:00 a.m., March 20, 1945

Recross Examination

By Mr. Merrill:

Q. I think you said that there was a yellow line on the highway?

A. Yes sir.

(Testimony of Alton P. Bunderson.)

Q. Was there any other kind of line there?

A. Yes sir.

Q. What kind? A. A white line.

Q. Both white and yellow line on this strip of highway? A. Yes sir.

Q. What do they indicate?

A. If the yellow line is on your side then you should not pass a car. [181]

Q. Why?

A. A curve or some other reason.

Q. What does the white line indicate?

A. That you should not pass a car in the same direction.

Q. Then the white and yellow line indicate that you should not pass? A. Yes, sir.

Q. Indicates that the depressions are so deep that you cannot see a car or that there is a curve?

A. Yes, sir.

Q. That is the condition here?

A. Yes, sir.

Q. I think you said that the depressions or basins were not deep enough so that you couldn't see another car?

A. I think I said I didn't know.

Q. You do remember there was a white and yellow line? A. Yes, sir.

Q. Do you remember whether the road was straight or curved? A. It was straight.

Q. But up and down?

A. It was up and down.

(Testimony of Alton P. Bunderson.)

Q. Do you remember the depth of those ups and downs? A. No, sir.

Q. Mr. Merrill: That is all.

Mr. Davis: Yes, that's all, Mr. Bunderson.

MIKE McGUIRE

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Mike McGuire.

Q. Where do you reside?

A. Kemmerer, Wyoming.

Q. How long have you lived at Kemmerer?

A. About a month.

Q. Previous to that where did you live?

A. Montpelier.

Q. How long did you live at Montpelier?

A. At around fourteen years.

Q. What is your occupation?

A. Roadmaster, on the Union Pacific Railroad.

Q. Were you roadmaster on September 11, 1942? A. No, sir.

Q. What was your position at that time?

A. Extra gang foreman on the railroad.

Q. Were you traveling along the highway on that day? A. Yes, I was.

(Testimony of Mike McGuire.)

Q. Going where? A. To Montpelier.

Q. And from where? A. Bancroft. [183]

Q. Which direction? A. South.

Q. Do you know R. D. Hair when you see him?

A. Yes, sir.

Q. He was in the Court room yesterday?

A. Yes, sir.

Q. Did any truck pass you that day between Soda Springs and Montpelier?

A. Yes, it passed me.

Q. What kind of truck was that?

A. A little Panel truck.

Q. Did it have lettering on it?

A. Signs of tobacco on the side,—a can of Prince Albert on the side and Cigarettes on the door.

Q. Was it going the same way you were going?

A. Yes, sir.

Q. Did you later learn who was driving the truck? A. Yes, sir.

Q. Who was it driving it? A. Mr. Hair.

Q. Was there anyone,—strike that please,—did you say it passed you? A. Yes, sir.

Q. Was there anything that attracted your attention when it passed?

A. It started to honking quite a ways before it got to me [184] as it was going around and after it went around me.

Q. Rather an unusual length of time?

A. Yes, sir.

(Testimony of Mike McGuire.)

Q. Now, what was your rate of speed at the time the truck passed you?

A. Thirty or thirty-five miles an hour.

Q. At what point between Soda Springs and Montpelier was it that the truck passed you?

A. About a quarter or a half mile south of the over-pass at Soda Springs.

Q. You have driven an automobile for how long Mr. McGuire?

A. Ten or twelve years.

Q. You have had occasion to observe the speed of moving vehicles have you?

A. Well, driving along the highway I have.

Q. And on the railroad?

A. Yes, sir.

Q. How fast was the truck going at the time it passed you on the highway?

A. This panel truck?

Q. Yes, on the highway south of Soda Springs that day?

Mr. Merrill: Objected to as incompetent, calling for a conclusion of the witness and no proper foundation is laid. The testimony here is that it was 6 or 7 miles at least to where the accident happened.

The Court: He may answer. [185]

A. I would say around sixty miles an hour.

Q. Did you later see that car?

A. Yes, sir.

Q. Where was it when you saw it next?

A. Upside down in the highway, or along the highway.

(Testimony of Mike McGuire.)

Q. Do you know how long it was after it passed you that you saw it down the highway?

A. I never paid any attention to the time.

Q. Did you continue about the same speed after it passed you? A. Yes, sir.

Q. Between the time the truck passed you and the time you came upon it tipped over did you meet any other vehicle of any kind? A. No, sir.

Q. Did you meet any semi-trailer or truck?

A. No, sir.

Q. What did you observe when you came on the truck?

A. I heard a horn honk and I couldn't see anyone, and as I came up over the hump I saw this truck turned over near the highway.

Q. Was the road straight or curving at that point? A. It was straight.

Q. Did you see anyone there at the time you stopped? A. Yes, sir.

Q. Who did you see? A. Mr. Hair. [186]

Q. Did you see anyone else?

A. Not until I got to the truck.

Q. Where was Mr. Hair when you first saw him? A. He came around the truck.

Q. What did you find when you went to the truck? A. I found this woman in the truck.

Q. And what did you do?

A. I took her out of the truck and took her to Montpelier.

Q. Where did you take her in Montpelier?

A. I went to see Doctor Lindsey and told him

(Testimony of Mike McGuire.)

I had this woman and then took her up to the hospital.

Q. Did Mr. Hair make any statement with reference to the accident?

A. Not until we started to Montpelier.

Q. What did he say then?

A. That he was drinking and driving too fast.

Q. Did he say anything about a semi-trailer?

A. No, sir.

Q. Did he say anything about hitting a rock and blowing out a tire? A. No, sir.

Q. Did you pay any particular attention to the tracks on the road or to the condition of the truck when you came up to where the truck was?

A. Not to the tracks on the road.

Q. What were you interested in, Mr. McGuire?

A. In getting the people to the hospital. [187]

Q. You didn't make any examination of the tracks? A. No, sir.

Q. Did you examine the tracks back from the scene of the accident, or the tipped over truck?

A. No, sir, I didn't.

Q. Did you examine the truck that was turned over? A. No, sir.

Q. Can you tell us generally what its condition was?

A. Well, just that it was upside down and the top was caved in.

Q. Did you see any merchandise there?

A. Yes, sir.

Q. What was it?

(Testimony of Mike McGuire.)

A. Chewing tobacco, and cigarettes.

Q. Where were they?

A. Just around there on the ground.

Q. Near the truck? A. Yes, sir.

Mr. Davis: That is all, you may take the witness.

Cross Examination

By Mr. Smith:

Q. Where had you been that day?

A. I was going from Bancroft to Montpelier, I had been working.

Q. Where did this panel truck pass you with reference to the over-pass on the road?

A. I would say a half or a quarter of a mile south of the over-pass. [188]

Q. How much have you driven an automobile?

A. Quite a bit in the last ten years.

Q. Most of your work with the Union Pacific Railroad Company during that time?

A. Yes, sir.

Q. Did you ever judge the speed of automobiles as distinguished from the speed of railroad cars?

A. I have checked motor cars and trains from the highway and from the track I have checked automobiles.

Q. What was the condition of the weather that day? A. It was raining.

Q. Do you remember what time of the day it was when the panel truck passed you?

A. I can tell within ten minutes.

Q. Approximately what time was it?

(Testimony of Mike McGuire.)

A. A quarter to four, approximately.

Q. And how fast were you driving?

A. Thirty or thirty-five miles an hour.

Q. You have had automobiles pass you on the highway before? A. Yes, sir.

Q. Isn't it usual that a car speeds up when it passes another car on the highway?

A. Yes, sir, that's right.

Q. And isn't it usual that a car, in passing another car, will sound its horn? A. Yes, sir.

Q. So that there wasn't anything unusual about this car passing you and speeding up on the highway that day, was there? A. Yes, sir.

Q. There was something unusual?

A. Yes, sir.

Q. What was unusual?

A. Well, a car doesn't start honking a half a mile from you and keep on as far as you can hear it afterward.

Q. Have you had experience with your horn catching? A. Yes, sir.

Q. And your experience has been that when a horn would catch it was rather difficult to get it released for the time being? A. Yes, sir.

Q. That horn was honking when you got up to the car after it tipped over? A. Yes, sir.

Q. And you say the automobile was turned upside down? A. Yes, sir.

Q. Now you said that this car had certain signs on it. Will you relate what you said in that regard?

A. As I remember it had tobacco signs on the

(Testimony of Mike McGuire.)

side of the car. It also had the picture of a can of Prince Albert.

Q. Upon which side was the Camel sign?

A. I can't tell you. [190]

Q. And on the other there was a tobacco sign?

A. I think they were on the same side.

Q. But you cannot say for sure?

A. No, sir.

Q. Now, did you say that it had a Camel sign on one side and a Prince Albert sign on the other side?

A. No, sir.

Q. What was it you meant to say?

A. It had a Prince Albert sign on the panel and a package of cigarettes on the door of the truck on the same side. I believe that is the way it was.

Q. On the same side?

A. Yes, the same side.

Q. Do you remember any lines on the road, yellow and white lines?

A. No, sir.

Q. Do you remember whether the road was wavey or up and down?

A. Yes, sir.

Q. It was or wasn't?

A. It was.

Q. Do you remember to what extent there would be dips in the road?

A. They were at the scene of the accident.

Q. Were these quite marked, rises and falls in the road?

A. Yes, sir.

Q. Do you remember that there were side roads in the vicinity where you drove that day? [191]

A. Yes, sir.

(Testimony of Mike McGuire.)

Q. Some of them were graveled roads leading out into the farming area?

A. I wouldn't know, but there were roads I know that.

Q. You do remember there were roads going to these farmers' places? A. Yes, sir.

Mr. Smith: That's all.

Redirect Examination

By Mr. Davis:

Q. You said that you could tell within ten minutes of the time the truck passed you. Had your attention been called to something so that was possible?

A. I had just looked at my watch before this.

Q. You said about four o'clock, was that in the daytime?

A. Four in the afternoon, a little after four when I drove up to the scene of the accident.

Q. You said the road was dipping up and down?

A. Yes, sir.

Q. Were you able to see cars approaching you?

A. No, sir, but I heard this horn honking.

Q. I mean cars approaching you on the road?

A. If you were just in the right place you might not be able to see them.

Q. There might be places where you couldn't see a car? A. There might be. [192]

Mr. Davis: That is all.

Mr. Merrill: That is all.

GEORGE H. NEWBY,

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. George Henry Newby.

Q. You are one of the plaintiffs in this action?

A. Yes, sir.

Q. How old are you now, George?

A. Thirty-seven.

Q. What was the date of your birth?

A. January 14, 1908.

Q. You were approximately some three years younger in September, 1942?

A. Yes, I was thirty-five at the time of the accident.

Q. Do you have any children?

A. Yes, sir.

Q. How many? A. Two children.

Q. Are the children here? A. Yes, sir.

Q. What are their names?

A. Pat and Dick,—Patty Ann and Dick. [193]

Q. How old are they?

A. Eight and maybe nine,—Patty Ann is eight, I think, and Dick is eleven.

Q. Where were you born, George?

A. St. Anthony, Idaho.

Q. Where were you living on September 11, 1942?

A. My family was living at Montpelier, Idaho.

(Testimony of George H. Newby.)

Q. Who were you employed by at that time?

A. M. K. Company.

Q. Morrison-Knutson Company?

A. Yes, sir.

Q. Are you single now? A. Yes, sir.

Q. Have you ever remarried since the death of your wife? A. No, sir.

Q. What is your present occupation?

A. I am a member of the United States Navy.

Q. Where have you been immediately prior to coming to this court?

A. In the South Pacific, been there for thirteen months.

Q. When were you married?

A. I was married in Montpelier on May 18, 1930.

Q. To whom were you married?

A. Miss Avenell Tuescher.

Q. How old was Avenell on September 11, 1942?

A. She was 28. [194]

Q. Do you remember the amount of the doctor's and nurse's bill at the time of this accident?

A. I think it was \$121.00.

Q. It is alleged that it was \$115.00.

A. Well, that is what it was.

Q. And the funeral expenses, do you remember what that was?

A. A little over \$250.00, I don't remember the exact amount.

Q. What size was Mrs. Newby?

(Testimony of George H. Newby.)

A. Approximately,—at that time a hundred and five pounds.

Q. What kind of a looking girl was Mrs. Newby?

Mr. Merrill: That is objected to as being entirely immaterial.

The Court: He may answer.

A. Very good looking.

Q. What kind of a housekeeper was she?

A. A very good housekeeper.

Q. What kind of care did she take of the children?

A. The very best.

Q. What kind of care did she take of you?

A. As good as possible.

Q. And what kind of a cook was Avenell?

A. A good cook.

Q. What was your feeling toward your wife?

A. I loved my wife very dearly.

Q. Did she return that affection? [195]

Mr. Merrill: Objected to as calling for a conclusion of this witness.

The Court: I think he may answer.

A. Yes, sir, she did.

Q. What kind of care did she take of the children?

Mr. Merrill: Objected to as being repetition.

A. Very good care.

The Court: The answer is in now, and it can do no harm, it may stand.

Q. Since the death of Mrs. Newby have you

(Testimony of George H. Newby.)

been able to have the children with you and provide a home for them? A. No, sir, I haven't.

Q. Where have they been since that time?

A. With my wife's mother, Mrs. Tuescher.

Q. Is she here? A. Yes, sir.

Q. Have you paid for the care of the children since that time, George? A. Yes, sir, I have.

Q. Up to the time that you went into the armed forces how much did you pay?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. There is no showing here as to the reasonableness of any amount that might have been paid, and there is no showing that he would not have had to pay anyway. [196]

The Court: He may answer.

A. I paid seventy-five dollars a month.

Q. Since you have been in the service how much has she received?

A. I think it is sixty-two dollars a month. There are certain amounts held out but I don't remember just what it is.

Q. Have you ever seen this gentleman sitting here? A. Yes, sir.

Q. What is his name?

A. It has escaped me for the moment, but I know it.

Q. Is it Donnelly? A. Yes, Donnelly.

Q. When did you first see him?

A. Sunday morning following the accident.

Q. And where did you see him?

A. Montpelier, Idaho.

(Testimony of George H. Newby.)

Q. Where did you first see Mr. Donnelly at that time?

A. My brother-in-law and I had been down to see my wife and were returning to his home. There is a Shell station near his home and that is where we saw Mr. Hair first and then Mr. Donnelly stepped up and introduced himself.

Q. What did he say when he introduced himself?

A. He introduced himself to me as the General Manager for this district for the R. J. Reynolds Tobacco Company.

Q. Did he say anything about why he was here?

A. He was there looking after the wrecked car and to get the goods that had been taken out of it and take them [197] back to Pocatello.

Q. Now, the conversation before that occurred, what was that conversation?

A. I was talking to Mr. Hair before Mr. Donnelly came up. I was asking about the wreck; my brother-in-law was there, too, and in the course of the conversation Mr. Donnelly came up.

Q. Was that while Mr. Donnelly was there?

A. He came up while we had the conversation.

Q. What was the conversation after Mr. Donnelly came up there?

A. I was talking to Mr. Hair about this wreck and his wife was standing there and it seems that Mr. Donnelly nor his wife had any idea that there was a woman with him at that time——

Mr. Merrill: ——Now we object to that as a con-

(Testimony of George H. Newby.)

clusion of the witness and it is not responsive to the question.

The Court: Yes, that is true. I realize that it is hard to approach this matter but I would suggest that the witness confine his testimony to what was said.

Q. What did Mr. Donnelly say?

A. He heard me tell Mr. Hair about my wife and he said, "My God, you have had another woman with you this time, too." [198]

Q. Did he call your attention to the illness of your wife or the kind of Doctor you had?

A. He asked if I had a competent Doctor; he said, "Maybe we had better get a better Doctor" or something like that, and I said I thought the Doctor we had was a good, competent doctor and he asked if he might see the Doctor and talk to him and I said "Certainly, go and talk to him."

Q. Was anything said about Mr. Hair's previous trouble?

A. Yes, sir; he said he had been in several jams and he had got him out of them and he said "Now he is entirely through; this was his last chance."

Q. Did he say anything about getting excited?

A. I was quite nervous and he said not to get excited. He said there was no reason to get excited; that there was nothing really wrong about it.

Q. Did he make any statement or was anything said about what kind of a ride it was?

A. Yes, that he had talked to Hair, and he said

(Testimony of George H. Newby.)

that I had nothing to worry about; there was nothing to it but just an innocent ride.

Q. Was there anything said about what you might do or what you should not do?

A. Yes, he said: "If you have any idea of bringing suit against us, you better not. We are fully protected [199] and you wouldn't get anywhere, "and that Mr. Hair didn't have anything and a suit would do no good against him, and not to think about getting a lawyer or anything like that.

Mr. Davis: That is all, Mr. Newby.

Cross-Examination

By Mr. Merrill:

Q. Where were you living in Montpelier?

A. I had an apartment.

Q. Where was that?

A. At the Downing Apartments.

Q. What kind of an apartment was that?

A. A family apartment.

Q. How many living in that apartment?

A. I wouldn't know.

Q. How long had you been living there?

A. Twenty-eight days prior to the accident.

Q. Had you received notice to move?

A. When?

Q. At any time.

A. Yes, I received notice to move. I think it was on Sunday because I know that—No, I didn't receive it at all; it was slipped under the door.

(Testimony of George H. Newby.)

Q. It was dated before the accident?

A. Not that I know of.

Q. Did you notice the date on it? [200]

A. I read it and disposed of it in the usual manner.

Q. What did you do with it?

A. I probably put it in the waste-paper basket.

Q. Do you remember what the notice said?

A. Yes, to vacate my apartment.

Q. To vacate the apartment? A. Yes.

Q. Did it give any reason?

A. Yes, too much noise.

Q. It was written before the accident?

A. I received it after the accident.

Q. Were you there at the time of the accident?

A. No, sir; I was in Kemmerer at that time.

Q. And when you got home it was under the door?

A. No, sir, it was not under the door.

Q. When did you get back to your home?

A. Four o'clock Saturday afternoon.

Q. Were your children there?

A. No, sir, they were not.

Q. What date was that, the 12th or the 11th?

A. The 12th, I guess. What date was the accident?

Q. I think you allege the eleventh.

A. It was the Saturday following the accident.

Q. When did you get word of the accident?

A. Saturday when I got home. [201]

(Testimony of George H. Newby.)

Q. Nobody called you; you were not called and advised?

A. No, sir, I was not called.

Q. And you had not been home since when?

A. Since the Monday morning preceding the accident at about three in the morning. I left for work about three Monday morning.

Q. Where were the children when you got home?

A. At Russell Tuesher's, my brother-in-law.

Q. How long had they been there when you got home?

A. I think since Saturday morning.

Q. You know they were there since the 10th?

A. No, sir, I do not.

Q. Do you know how long your wife was away?

A. No, sir, I didn't at that time.

Q. Did you inquire later? A. Yes, sir.

Q. Did you find out that she left the evening of the 10th?

A. No, sir. My impression was that she was not out all night.

Q. But you know it now?

A. No, sir, I don't. I think she left at about nine o'clock in the morning.

Q. You don't believe that?

A. Yes, I do. I heard it.

Q. You heard it? A. Yes, sir.

Q. And you say you think she left at nine o'clock in the [202] morning?

(Testimony of George H. Newby.)

A. That is what certain people told me.

Q. By what certain people were you told?

A. Certain friends of my wife and mine.

Q. Now how long had you been living in this apartment?

A. Twenty-eight days previous to the wreck.

Q. Where did you live before that?

A. Bristol, Tennessee.

Q. How long had you been down there in Tennessee?

A. I think I went in February and returned in August.

Q. Where did you live before that?

A. Andreson Dam near Boise, Idaho. I was working for the construction company.

Q. How long did you live in St. Anthony after your birth?

A. I think for four years.

Q. Where did you move then?

A. To Nyssa, Oregon.

Q. How long did you live there?

A. In 1926 I graduated from high school. I have been back several times since that time.

Q. Now, where did you say you first met Mr. Donnelly?

A. At the Shell Service station, Montpelier, Idaho.

Q. What date was that?

A. That was Sunday morning.

Q. Did he ask about your wife at that time?

A. Yes, sir.

(Testimony of George H. Newby.)

Q. He wanted to know if you had a competent doctor? A. Yes, sir.

Q. And suggested that if you didn't have, to get one?

A. That he might get one if I didn't have.

Q. And he asked if you cared if he went down to see the Doctor, did he? A. Yes, sir.

Q. You told him that was all right?

A. Yes, sir.

Q. Do you know that he went down to see the Doctor?

A. Yes, sir; I went to the hospital at the time he went to talk with the Doctor.

Q. Do you remember any other conversation?

A. Yes, sir; we had a conversation in the afternoon at the police station.

Q. Who was there at that time?

A. Several of us. Mr. Donnelly, myself, Mr. Bunderson and I think the Chief of Police and Mrs. Hair and Russell Tuescher. I think that is all.

Q. Was it at that conversation that you said that Mr. Donnelly made this statement?

A. No, sir. We were there about releasing Mr. Hair to go home to his family.

Q. You had no conversation with Mr. Donnelly at the police station except about releasing Mr. Hair to go home? [204] Where was this other conversation with Mr. Donnelly?

A. At the service station.

Q. Who was present?

(Testimony of George H. Newby.)

A. Russell Tuescher, Mrs. Hair, myself, Mr. Donnelly and Mr. Hair.

Q. What time was that?

A. That was between seven and ten in the morning.

Q. You drove up there, did you?

A. We walked up there.

Q. They were there when you arrived?

A. That is where we saw Mr. Hair.

Mr. Merrill: I think that is all.

Redirect Examination

By Mr. Davis:

Q. Mr. Newby, Counsel stated to you that you knew that your wife was out all night, that you had heard it testified to on several occasions and by different ones. Have you ever heard that testified to, that is, that your wife was out all night with Mr. Hair, have you ever heard that testified to by anybody except Hair? A. No, sir.

Q. Did anybody else ever tell you that?

A. No, sir.

Q. You did not finish your explanation as to why your investigation caused you to think that she left Montpelier [205] at nine o'clock. Was there any other explanation you wish to make?

A. It is kind of hard to have people tell you stuff like that. This friend of mine told me that my wife——

(Testimony of George H. Newby.)

Mr. Merrill: Now, we must object to any conversation with other people. It is purely hearsay.

The Court: I think he may answer in view of your cross-examination.

A. I talked with several people that thought she left at about nine o'clock in the morning. They didn't want to be subpoenaed as witnesses. They don't like to be witnesses and I think that is why they said "We heard she left at nine."

Mr. Merrill: We move to strike that as a conclusion of the witness and it is incompetent, irrelevant and immaterial.

The Court: The matter was gone into in regard to his knowledge that his wife was out every night or all night with Hair, and he testified that he didn't think she was out all night, but that she had gone out about nine in the morning. I will sustain the motion to strike the portion that is hearsay.

Mr. Davis: I don't think that portion where he explains his reason is hearsay.

The Court: The portion which is hearsay may be stricken. [206]

Q. You were asked if you made any investigation to find out where your wife was and when she left Montpelier?

A. Yes, I was asked if I made any inquiry.

Q. From the investigation or inquiries you made, what did you find out and what is now your opinion as to where your wife was and when she left that day?

Mr. Merrill: Objected to as calling for a con-

(Testimony of George H. Newby.)

clusion and is a matter which the jury must pass upon.

The Court: He may answer.

A. What I think to be true is that she left at about nine o'clock in the morning of the accident.

Mr. Davis: That is all.

Mr. Merrill: That's all.

MRS. ROSETTA TUESCHER,

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Rosetta Tuescher.

Q. Where do you live? A. Geneva.

Q. Are you married? A. Yes, sir. [207]

Q. Did you have any children?

A. Yes, sir.

Q. How many children did you have?

A. I had eight children.

Q. Did you have a daughter, Avenell?

A. Yes, sir.

Q. Was she the wife of Mr. Newby, who was just on the stand here? A. Yes, she was.

Q. How old was Avenell at the time she died in September, 1942?

(Testimony of Mrs. Rosetta Tuescher.)

A. She was twenty-eight years old in August, the 9th of August of that year.

Q. How many children did Avenell have?

A. Two.

Q. Are these the children that are here in the Court room? A. Yes, sir.

Q. Do you take care of them, Mrs. Tuescher?

A. Yes, I take care of them.

Q. How long have you been taking care of them?

A. Ever since their Mamma died.

Q. Do you get paid for caring for them?

A. Yes, sir.

Q. Who pays you?

A. Before George went into the Navy he paid me.

Q. What amount did he pay you before he went into the Navy?

A. Seventy-five dollars a month for everything.

Q. Did you have occasion to visit Avenell's home at different times after her marriage?

A. Yes, sir.

Q. What kind of a housekeeper was Avenell?

A. A mother always thinks her girl is fine, but she kept a clean house; yes, she was a good housekeeper.

Q. What kind of care did she take of the children?

A. Very good care of the children.

Q. What was their demeanor when they came to you?

(Testimony of Mrs. Rosetta Tuescher.)

A. They were just like little children of that age. Every Mother knows what little children are.

Q. Do you know what this exhibit is, Mrs. Tuescher? A. Yes, sir.

Q. And who is that a picture of?

A. That is a picture of my little girl.

Q. Is that a good likeness of her? A. Yes.

Q. At the time she passed away?

A. This was taken a year or two before, but this is just like Avenell.

Q. Did she look like that?

A. Very much,—she was a pretty girl.

Q. Mr. Davis: We have had this marked as plaintiff's exhibit 9, and we now offer it in evidence.

Mr. Merrill: We object to this exhibit; it is [209] immaterial; no proper foundation has been laid; it has not been properly identified as a true likeness, it is testified that it was taken at a different time, some two years before the accident. The most that this witness could say was that it was a pretty good likeness, or pretty much of a likeness. It is also designed and intended to prejudice the jury, and as I said no proper foundation has been laid for the admission of the exhibit.

The Court: Objection overruled. It may be admitted.

Mr. Davis: That is all, thank you, Mrs. Tuescher.

Mr. Merrill: No cross-examination.

RUSSELL TUESCHER,

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Russell Tuescher.

Q. Where you yo ulive?

A. Montpelier, Idaho.

Q. How long have you lived there?

A. All my life. [210]

Q. What is your occupation?

A. Conductor on the Union Pacific.

Q. What is your age? A. Thirty-three.

Q. Avenell Newby was your sister?

A. Yes, sir.

Q. I call your attention to this gentleman sitting here. Have you ever seen him before?

A. Yes, sir, I have.

Q. And did you ever see Mr. Hair who was in the Court Room yesterday? A. Yes, sir.

Q. You know the man I refer to?

A. Yes, I know.

Q. When did you see these two gentlemen?

A. The first time is the time that J. was at the hospital visiting my sister.

Q. Where was that?

A. I just came out of the hospital and I asked my brother Calvin "What does this man Hair look

(Testimony of Russell Tuescher.)

like?" and he said there he is now and I walked across and said "Avenell is dying and we don't like this"—

Mr. Merrill: We object to this. It is not responsive and it is a conversation with——

Mr. Davis: I consent that it be stricken.

The Court: It may go out. [211]

Q. Russell, I am asking in reference to Mr. Donnelly and Hair. Did you later see Mr. Donnelly?

A. The first I saw these two men was in front of the Blue Light Service station I stopped them and asked them where they were going.

Q. Just a minute,—did you have a conversation with Hair when Donnelly was there?

A. I did.

Q. What was that conversation?

A. I said "you are the tobacco salesman" and then I said "my sister was with you last night" and I said "where are you going" and he said "I am leaving town" and I said "my sister is very ill" and I said "you are not leaving town until we know the outcome of this."

Q. Did Mr. Donnelly say anything at that time?

A. Mr. Donnelly recognized the fact that Mr. Hair was very excited——

Q. Never mind that Russell,—just what Mr. Donnelly said.

A. He came up and said "What is the trouble?" and I told him and he said "Good God, Hair, did you have a woman in the car with you again"?

(Testimony of Russell Tuescher.)

Q. What did Hair say?

A. He said "yes"—he said "I thought everything would be all right and I would not have to let you know."

Q. Did Mr. Donnelly say anything else? [212]

A. He asked what kind of medical care she was getting and I said "we have the best doctor in Montpelier" and he said "Is there anything else that we can do for her" and I said "the best way to find out is to consult the doctor".

Q. Did you go to the hospital?

A. Yes, sir.

Q. Did Mr. Donnelly say anything further to you?

A. Yes, Mr. Donnelly said that he had had trouble several times with Hair that he caused him a lot of trouble and grief and that was the last straw, that he was through with him.

Q. Did he say anything about your occupation?

A. Yes, he said he was through with him, and he said if I needed a job that he would give me one.

Q. What did you tell him?

A. That I had a good job with the Union Pacific.

Q. Was there any conversation with reference to George Newby, with Mr. Donnelly?

A. Yes, sir, there was in a way.

Q. What did he say?

A. He said "Russell, you look like a level headed fellow and I wish you would tell him",—he said "we are such a big corporation and have so

(Testimony of Russell Tuescher.)

much to protect" he said; "all he could do would be to spend a few of his hard earned dollars and end up with nothing at all". [213]

Q. Did he say anything about George getting a lawyer? A. Yes, sir.

Q. What did he say?

A. He said "there may be some shyster lawyer with the thought in mind that he had a case against us and you better talk him out of it because there would not be a possible chance."

Q. Did Mr. Donnelly make any statement as to why this man was through with the Company?

A. Only because he had such trouble with him previously.

The Court: I think we will recess at this time until 1:30.

1:30 P. M. March 20, 1945.

Mr. Davis: That is all the direct examination.

Cross Examination

By Mr. Merrill.

Q. What was your occupation in September, 1942? A. Brakeman.

Q. Out of Montpelier? A. Yes, sir.

Q. Where do you, or where did you live in Montpelier?

A. I had a home between the Blue Light Service Station and Fourth.

Q. How far from the Downing apartments?

(Testimony of Russell Tuescher.)

A. About two blocks.

Q. Were these children at your place when Mr. Newby came home on Saturday? A. Yes, sir.

Q. Are you at home each night?

A. No, sir.

Q. Were you home on the nights of the 10th and 11th of September? A. No, sir.

Q. I mean in 1942? A. No, I wasn't.

Q. When did you get home?

A. I don't know exactly what date I came in but it was around two,—two A. M. Saturday.

Q. What day was your sister injured on?

A. Friday.

Q. You came home what day?

A. Saturday.

Q. In the morning? A. Yes, sir.

Q. The children were at your home when you got there? A. No, sir.

Q. And they had been for some time?

A. No, sir.

Q. Didn't you ask your wife——

Mr. Davis: We object to anything that he [215] may have asked his wife——

Mr. Merrill: I will withdraw the question.

Q. You knew that they were there?

A. On this day, I did, yes.

Q. You had a conversation with Mr. Donnelly?

A. Yes, sir, I did.

Q. When was the first conversation with Mr. Donnelly, if you had more than one?

(Testimony of Russell Tuescher.)

A. At the Blue Light Service Station.

Q. When was that? A. Sunday.

Q. Who was there?

A. Mr. Donnelly; my brother; George Newby; my father; Mrs. Hair; Mr. Hair and two other ladies that I didn't know.

Q. What was said?

A. I said "you are not leaving town until we know the effects on my sister, she is dying and we don't like it".

Q. Is that the time you said "my sister was with you last night?"

A. I asked Mr. Hair that.

Q. What was the exact words you said to Mr. Hair? A. I couldn't say them exactly.

Q. What did you say on direct examination?

A. Well, I knew that my sister was with him because my friends had——

Mr. Merrill: Just a minute, I move to strike [216] the answer except that he knew his sister was with him,—I move to strike the answer, it is not responsive?

The Court: I will strike it, yes.

Q. You had information that your sister had been out with Hair that night?

A. No, I didn't.

Q. What did you mean when,—strike that, please,—you had information that she had been with Hair. A. Yes, I did.

Q. What did you mean when you testified that

(Testimony of Russell Tuescher.)

you said my sister was with you last night, to which Mr. Hair said "yes." A. What did I mean?

Q. Yes, what did you mean by that.

A. I meant that it was ungentlemanly to run off and leave her after he had killed her.

Mr. Merrill: I move to strike that as not responsive. It seems to me that the words themselves denote the meaning.

Q. Mr. Tuescher, did you, in that conversation with Mr. Hair say in substance and effect "my sister was out with you last night"?

A. I did not.

Mr. Davis: It seems to me that this has been asked and answered.

Q. To whom did you say that? [217]

A. I don't think I said those words to anyone.

Q. What did you say? A. I don't recall.

Q. Give us just what you do recall.

A. I was seeking information as to whether he was with her or not.

Q. What did you say?

A. I wouldn't know.

Q. Tell us as near as you can?

A. It would probably be jumbled up.

Q. In answer to a question by Mr. Davis you said "my sister was with you last night and Hair said yes" is that a fact? Did you say that, and did Hair say yes?

A. At the moment I might have said that.

Q. Did you say that? What is the truth about it? A. I could.

(Testimony of Russell Tuescher.)

Q. Did you say those words?

A. I did say those words.

Q. Now, what night did you have reference to?

A. I don't know.

Q. When you made that comment, what night did you have reference to? A. I don't know.

Q. You didn't mean Saturday night?

A. I didn't know what night they were together. [218]

Q. When you made that remark what night did you refer to, Saturday night or any preceding night?

A. The night I referred to was Saturday night, I didn't know anything about any other night.

Q. You knew she was in the hospital Saturday morning.

A. I knew she was in the hospital.

Q. You knew she had been injured Friday afternoon? A. I did.

Q. And you didn't mean Saturday night then, did you? A. I did.

Q. Why did you ask if he was with her?

A. At times you may make a mistake.

Q. Answer my question.

A. I asked the gentleman, "were you with my sister last night".

Q. And you meant the night of the injury?

A. I did not.

Q. You had been informed that he was with her the night of the injury? A. I had.

(Testimony of Russell Tuescher.)

Q. And that was the night you had reference to when you asked Hair that question?

A. No, sir, it wasn't.

Q. Then why did you ask about the night she was in the hospital?

A. That is what I asked him. [219]

Q. You knew that you wasn't with her in the hospital? A. Is that so.

Q. Well, didn't you?

A. I knew he was there.

Q. When you said "were you with my sister last night" you meant the night preceding the accident? A. I did not.

Q. Why did you make that comment?

A. Because it looked very cheap to run off without visiting her before he left. I knew he was in the hospital Saturday night.

Q. Why did you say "my sister was with you last night," those are your exact words.

Mr. Davis: I submit, if the Court please, that the witness has attempted to explain this and if the explanation of the witness is not satisfactory to counsel he cannot keep after the witness in this manner.

The Court: The explanation made does not seem to be satisfactory to counsel. I will let him answer once more.

A. I was informed that this man was leaving town and I wanted to find out for my personal satisfaction. I wanted to find out the true facts Saturday night before he left. [220]

(Testimony of Russell Tuescher.)

Q. You had been informed that he was with her the night of the injury.

A. That has nothing to do with it.

Q. You had been informed that your sister had been with this man the night preceding the accident.

A. I had been,—Friday night.

Q. The night preceding the accident.

A. I did, yes.

Q. The accident was Friday night or Friday afternoon, so that would be Thursday night.

A. Yes.

Q. The children were at your home when you came home?

A. Yes, sir.

Q. They had been there before you got home for some time?

A. I don't know.

Q. Mr. Newby was present when you said to Hair, "my sister was with you last night" and you said that Hair said "yes".

A. He was not.

Q. Wasn't Mr. Newby present at that conversation.

A. He was not.

Q. You testified that Mr. Newby and your brother and some others were there?

A. I sent my brother Calvin after my brother-in-law George Newby.

Q. When you made this comment to Hair, who was present?

A. The two of us, myself and brother Calvin and I later [221] sent for these other men.

Q. Mr. Donnelly was there?

A. Yes, sir.

Q. And Mr. Hair.

A. Yes, sir.

(Testimony of Russell Tuescher.)

Q. Who else? A. Brother Calvin.

Q. The four of you. A. That's right.

Q. You say that Donnelly spoke up and said "Good God, Hair, did you have a woman in the car with you again?" A. That's right.

Q. Was that before or just following the statement to Hair "my sister was with you last night."

A. No, sir, it wasn't.

Q. When was that comment made?

A. That was in the presence of these men I mentioned.

Q. I beg your pardon.

A. In the presence of all these men.

Q. When was the comment made that you say was made "Good God, Hair, did you have a woman in the car with you again"? When was that comment made, and who was present?

A. My father, my brother, Mr. Donnelly, Mr. Hair and myself.

Q. Was Mr. Newby there? A. Yes, sir.

Q. How long after you made the first statement to Hair was that comment made?

A. My brother had just left the platform of the station and come back because my father and George were practically at the station at that time and so he turned around and made the statement.

Q. Have you stated all the conversation that occurred at that time in answer to Mr. Davis' question? A. All that I can, yes I think so.

Q. Mr. Donnelly said that Hair was through.

A. That he was washed up.

(Testimony of Russell Tuescher.)

Q. Did Mr. Donnelly say at that time that he was fired? A. In my words he did, yes.

Q. You say that he offered you a job.

A. Yes, sir.

Q. What was the language that he used.

A. Mr. Donnelly and I were sitting in the car when Don Stevens came to work and I said "coming to work or going" and Mr. Donnelly said to me, "Russell have you got a job" and I said "yes" and he said, "if you didn't have I was going to give you one".

Q. Donnelly said "if you didn't have a job I was going to offer you one".

A. He did offer me one.

Q. I want his words. [223]

A. He did offer me a job.

Mr. Merrill: The witness is not answering my question.

The Court: You may ask the question again, and just answer the question, Mr. Witness.

Q. What did Mr. Donnelly say to you and what did you say to him? A. He offered me a job.

Q. What words did he use?

A. I don't know.

Q. You made the statement as to what he said?

A. I don't know.

Q. You have forgotten it. A. Yes, sir.

Q. Since you related it on the witness stand here? A. I surely have.

Q. You remember some of the other matters three or four years ago?

(Testimony of Russell Tuescher.)

Mr. Davis: That is argumentative.

Mr. Merrill: Yes, it is, I withdraw it. That is all.

Mr. Davis: That is all. Now, if the Court please, at this time I want to offer the testimony of Calvin Tuescher as given at the former trial. I have made inquiry, and if my statement as to why he is not here is [224] sufficient otherwise I will be obliged to make a showing by calling the United States Marshal. I know the facts connected with this matter.

The Court: What does counsel for defendants have to say about this.

Mr. Davis: If the Court please, counsel has kindly agreed that my statement of this matter may be taken as correct without proving it with sworn testimony, but counsel has not admitted that I may use the testimony. With reference to Calvin Tuescher he was a witness here at the former trial and was cross examined by Counsel for the Reynolds Tobacco Company. Mr. Tuescher has been in India in the United States armed forces for some fourteen months and when I learned that there was to be a new trial I immediately tried to take his deposition. I gave a subpoena to the United States Marshal and of course, he could not serve him I tried to take his deposition and was not able to do this and I ask now to read the testimony of this witness at the former trial.

Mr. Merrill: We take Mr. Davis' statement to

be the facts, but we object to the use of this testimony on the ground that it is incompetent, irrelevant and immaterial. The parties are different from the parties who were in the trial before——

The Court: My recollection is that the rules of Civil Procedure provide for the use of this testimony. The objection will be overruled.

Mr. Davis: The testimony that I seek to read from shows the certificate of G. C. Vaughan as the official Court reporter who took the testimony and the certificate is dated the 9th day of March 1944. I am going to read from the testimony given at the former trial at page 173 of the original transcript.

“CALVIN TUESCHER,

being called as a witness on the part of the plaintiffs after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. State your name?

A. Calvin Tuescher.

Q. Have you ever been a witness before?

A. No, sir.

Q. How old are you Calvin?

A. Twenty.

Q. Where do you live? A. Geneva, Idaho.

Q. You are a brother of Avenell Newby?

(Testimony of Calvin Teuscher.)

A. Yes, sir.

Q. Calling your attention to this gentleman here, the third [226] from the end (indicating), have you ever see him before? A. Yes, sir.

Q. And the other gentleman next to him, this way? A. Yes, sir.

Q. Where did you meet them?

A. Montpelier.

Q. Where were you in Montpelier when you met them?

A. With my brother Russell in front of the Burgoyne Service Station.

Q. Did you hear any conversation at that time?

A. Yes, sir.

Q. Did Russell say anything to Mr. Hair when they met there? A. Yes, sir, he did.

Q. What did he say?"

"Mr. Merrill: Objected to as no foundation is laid, when it was or the place."

Mr. Davis: There was no ruling on that and no answer.

"Q. You heard your brother Russell testify?

A. Yes, sir.

Q. How long was it after the accident in which Avenell was hurt was it that you had this conversation, or was the conversation had?

A. Shortly after.

Q. In what town? A. Montpelier. [227]

Q. At what place?

A. Roy Burgoyne Service Station.

Q. Who was there?

(Testimony of Calvin Teuscher.)

A. Mr. Hair, my brother and myself, in which this gentleman said he was going to leave town.

Q. Did Mr. Donnelly come up when you were talking, or when they were talking?

A. That's right.

Q. What did your brother say?

A. He asked him where he was going and he said that he was going home, and my brother said in case you are interested that is my sister that is in the hospital dying now, and you are not going.

Q. Did Mr. Donnelly say anything?

A. Yes, sir.

Q. What did he say?

A. He said "for God's sakes were you with another woman".

Q. Was anything said there with reference to the Doctor? A. That's right.

Q. By Mr. Donnelly? A. Yes, sir.

Q. What did he say?

A. He questioned the efficiency of the Doctor because it was such a small place.

Q. Did you go any place then?

A. Yes, to the hospital. [228]

Q. How did you go?

A. I drove George Newby's car.

Q. Who went with you?

A. My brother and Mr. Donnelly.

Q. Did you hear your brother and Mr. Donnelly have any further conversation?

A. They did.

Q. What did Mr. Donnelly say?

(Testimony of Calvin Teuscher.)

Mr. Merrill: Objected to as no time or place is fixed.

Mr. Davis: I will fix the time and place Mr. Merrill.

Q. In the automobile when you were driving to the hospital did they have a conversation?

A. Yes, sir.

Q. Mr. Donnelly was in the car was he?

A. Yes, sir.

Q. You were in the car?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. Yes, sir.

Q. Now, what did he say?

A. He said that Russell was a very level headed fellow"——

Mr. Davis: Strike that.

"A. He said that Russell was very level headed, the coolest one in the bunch and he offered him a position. He said [229] he couldn't trust Hair any more.

Q. Was there anything said about warning him before?

A. Yes, sir, he said he couldn't trust him any more.

Mr. Davis: That is all, you may examine."

Shall I read the cross examination?

Mr. Merrill: Yes, go ahead.

(Testimony of Calvin Teuscher.)

“Cross Examination

By Mr. Merrill:

Q. Isn't it a fact that what Mr. Donnelly said to your brother about a position was that he asked if he had a position, or was working. Isn't that what he said?

A. He offered him a position.

Q. Isn't it a fact that he asked your brother if he had a position or was working?

A. Well, I don't remember the exact words.

Q. Would you say that was not what was said?

A. No.

Q. Don't you recall that what was said about a position, Mr. Donnelly asked your brother if he had a position or was working?

A. I don't remember just the words.”

Mr. Davis: That is all the testimony of Calvin Teuscher, and at this point in the proceedings of the former trial I read from 41 Corpus Juris and I ask permission to read from it again at this time. [230] Mr. Merrill has consented that if the same ruling is made as formerly made that I don't have to have the volume here, but may read from the record here.

Mr. Merrill: We object to the introduction of this as being incompetent, irrelevant and immaterial for any purpose whatsoever.

The Court: Overruled. You may read it.

Mr. Davis: “The table shows, at page 216 of volume 41 Corpus Juris that the life expectancy of one 28 years of age to be 36.73 years.”

L. R. DONNELLY,

called by the plaintiff for cross examination under the rules, testifies as follows:

Cross Examination

By Mr. Davis:

Q. State your name?

A. L. R. Donnelly.

Q. Where do you live?

A. Salt Lake City, Utah.

Q. Who do you work for?

A. R. J. Reynolds Tobacco Company.

Q. How long have you worked for them?

A. Now, approximately fifteen years.

Q. Were you employed by them at all times when Rulon D. Hair was a salesman for that Company?

Mr. Merrill: Now, we object to any further proceedings by cross examination under the statute upon the ground that it doesn't appear that this testimony is peculiarly within the knowledge of this witness. If they want to call him as their own witness that is another matter, but for cross examination and to interrogate him about matters that can be shown by various other witnesses, I do not think that should be permitted.

The Court: Under the rules of civil procedure he has a right to call him.

Mr. Merrill: I know of none that give him the right to call him for cross examination and then examine him on such matters.

The Court: Overruled. I am sure the rules so provide.

Mr. Merrill: Exception please.

(Testimony of L. R. Donnelly.)

A. I was.

Q. How long was Mr. Hair a salesman for the Company?

A. Well, if I recall right he started to work in 1937.

Q. Do you know what his age was at that time?

A. No, sir.

Q. Mr. Hair was working for the Reynolds Tobacco Company at all times from the time he started to work until September 3, 1942?

A. He was employed, yes sir. [232]

Q. Do you know Mr. Hair's signature?

A. I believe I do.

Q. Handing you what has been marked as Plaintiff's exhibit 10 I will ask you, do you know whose written signature is on that?

A. No, I don't know.

Q. Do you know the writing of the person that signed the application for the license?

A. I don't know who signed it. You mean the R. D. Hair?

Q. Is that Hair's writing?

A. I wouldn't swear to it.

Q. What do you think?

A. I wouldn't know.

Q. You saw his hand writing many times?

A. That's right.

Q. He made many reports to you?

A. Yes, sir.

Q. But you don't know whether that is his hand writing or not, Mr. Donnelly?

A. No, sir.

(Testimony of L. R. Donnelly.)

Q. Do you know whose hand writing these words are: "L. R. Donnelly by R. D. Hair"?

A. I wouldn't say for sure, but it appears like Hair's writing.

Q. Is it or isn't it Hair's writing?

A. I wouldn't say for sure. [233]

Q. Now, exhibit 12 marked for identification, can you tell whose hand writing that is?

A. I cannot tell whose writing it is, but it is the signature of Hair.

Q. I ask you to look at this exhibit marked 13 for identification. I am referring now, Mr. Donnelly, to the name Donnelly by Hair. Do you know whose hand writing it is?

A. It looks like Hair's hand writing.

Q. Do you say it is or not?

A. I wouldn't say it is.

Q. Did Mr. Hair have authority to sign your name?

A. I believe I gave him authority on that occasion.

Q. What was that occasion?

A. Because it wasn't possible for me to get his license plates for the car and I gave him authority to get the license plates.

Q. Gave him authority to sign for the license in your name?

A. Yes, at one time I did.

Q. What was that time?

A. To get the license plates.

Q. Yes, what time was that?

(Testimony of L. R. Donnelly.)

A. It says 1942 here.

Q. Did you ever give him authority more than once? A. It is possible that I did.

Q. Did he have authority in 1938, 1939, 1940, 1941 and 1942 [234] to go to the County Assessor and get the license and sign for you in getting the license for the truck to use in selling the products of the Reynolds Tobacco Company?

A. It has been a long time ago, but if he did I guess I gave him the authority.

Q. Did you give him the authority to do that?

A. I must have.

Q. You must have?

A. Yes, sir, I must have.

Mr. Davis: That is all at this time.

Mr. Merrill: No questions.

RULON D. HAIR,

called by the plaintiffs for cross examination under the rules, after being first duly sworn, testifies as follows:

Cross Examination

By Mr. Davis:

Q. Will you state your name?

Mr. Davis: I am calling this witness for cross examination as the party who was the agent of the company at the time I am seeking to examine him about now.

(Testimony of Rulon D. Hair.)

Mr. Merrill: We object to this procedure. There is no rule on that matter. He is not a party to this action. [235]

The Court: Of course, you can call him as your witness: I think perhaps you better get that rule for me before a final ruling is made on this matter.

Mr. Davis: Yes, I want to get that rule later but I can proceed now with him called as my own witness.

Direct Examination

By Mr. Davis:

Q. Your name is Rulon D. Hair?

A. Yes, sir.

Q. I call your attention to the signature, R. D. Hair. Whose writing is that? A. Mine.

Q. That is your writing? A. Yes, sir.

Q. Who were you working for when you wrote that? A. The Reynolds Tobacco Company.

Q. Who was the Division Manager under whose supervision you worked at that time?

A. L. R. Donnelly.

Q. Is he the gentleman who was just on the stand? A. Yes, sir.

Q. Did you have authority to sign that application as L. R. Donnelly, by yourself?

A. I didn't sign this L. R. Donnelly. [236]

Q. I will ask you if you had authority to sign your name and secure a license in your name for L. R. Donnelly? A. I must have.

Q. You secured the license did you not?

(Testimony of Rulon D. Hair.)

A. Yes, sir, on this particular one it seems that I had a little difficulty until I got his permission.

Q. You got the license? A. Yes, sir.

Q. And you put it on the Reynolds Tobacco Company truck did you not? A. Yes, sir.

Q. You used it and it was registered in the name of L. R. Donnelly? A. Yes, sir.

Mr. Davis: These four exhibits were used before. They were marked for identification and later marked admitted. They are original records and I was permitted to insert copies. If they are admitted I ask permission to follow the same procedure and to substitute copies.

Mr. Merrill: We have no objection to that procedure.

The Court: Very well, you may do so.

Mr. Davis: We now offer exhibit number 10, plaintiffs' exhibit 10.

Mr. Merrill: No objection. [237]

The Court: Admitted.

Q. Now, you have been presented with exhibit marked for identification as plaintiffs' exhibit 11, I call your attention to the handwriting on that application and ask you whose it is?

A. It is mine.

Q. How did you sign that?

A. L. R. Donnelly by R. D. Hair.

Q. Did you have authority to do that?

A. I evidently did.

Q. Did Mr. Donnelly give you authority to secure the license in that way?

(Testimony of Rulon D. Hair.)

A. He must have.

Q. You used the licenses you secured in that way on the truck that was registered in Mr. Donnelly's name and which was delivered to you by the Reynolds Tobacco Company?

A. Yes, sir.

Q. And you used it in going over your territory?

A. Yes, sir.

Mr. Davis: We offer Exhibit 11 as evidence at this time.

Mr. Merrill: No objection.

The Court: Admitted.

Q. Now I call your attention to Plaintiffs' Exhibit 12 marked for identification and ask you who signed the [238] application for license that year?

A. I did.

Q. Did you sign Mr. Donnelly's name at that time?

A. No, sir.

Q. Did you procure that license?

A. I cannot tell. There was one that I had some difficulty with and I don't know which it was.

Q. Did you have a license that year?

A. Yes, sir, I had one every year.

Q. And you used it on the car?

A. Yes, sir.

Q. Did you have authority to sign that year for Mr. Donnelly?

A. I must have had.

Mr. Davis: We offer in evidence at this time Plaintiff's Exhibit 12.

Mr. Merrill: No objection.

The Court: Admitted.

(Testimony of Rulon D. Hair.)

Q. Exhibit 13 has been handed to you. Who signed that application? A. I did.

Q. How is it signed?

A. Lewis R. Donnelly by R. D. Hair.

Q. You had authority to sign his name on that?

A. Yes, sir.

Q. That is the application for license?

A. Yes, sir. [239]

Q. You secured a license on that application?

A. Yes, sir.

Q. And placed it on the truck?

A. Yes, sir.

Q. And secured the license in the name of Mr. Donnelly? A. Yes, sir.

Q. With Mr. Donnelly's consent and authority?

A. Evidently.

Q. And you used it on the truck?

A. Yes, sir.

Mr. Davis: Now I offer Exhibit 13 in evidence.

Mr. Merrill: No objection.

The Court: Admitted.

Mr. Davis: I would like to have the Bailiff hand me the deposition of E. A. Darr. Would Your Honor like to have a copy to follow the reading? I have an extra copy. I want to read from the Cross-Examination of Mr. Darr.

Mr. Merrill: I object to this at this time upon the ground that it is immature and upon the further ground that cross-examination of a witness whose direct examination is not before the jury is confus-

(Testimony of Rulon D. Hair.)

ing and is improper in the presentation of the matter to the jury, particularly when the originla [240] testimony has not been produced.

The Court: The objection will be overruled. You may proceed with the reading.

E. A. DARR.

Cross examination in deposition of E. A. Darr was read by Mr. Davis.

“Cross Examination

“Q. Mr. Darr, I believe you stated that Mr. Rulon D. Hair was employed by the Company some time in 1937? A. July 10, 1937.

Q. Has Mr. Hair been in the continuous employment of the R. J. Reynolds Tobacco Company since that date, up until the time of this accident about which this suit is involved? A. He had.

Q. This panel truck you spoke of, involved in the accident in the case at bar, was delivered to him some some time in 1942?

A. On February 8, 1942.

Q. Was that a new Chevrolet panel truck at that time?

A. I am not certain, but I am inclined to think it was, since that agreement would have to be signed by a salesman each time a new car or a car is delivered to him.

Q. Or a change of the car?

A. Or a change of the car. He had previously

(Deposition of E. A. Darr.)

signed a similar agreement in February, 1938, which was the first [241] time he had been given a car.

Q. What kind of a car was that you delivered to him at that time—a Chevrolet?

A. I am unable to say. My records don't show.

Q. Well, the car you delivered to him in 1938, the first car, was that the only car that was delivered by the R. J. Reynolds Tobacco Company to Mr. Hair up until this car in February, 1942?

A. That is correct.

Q. In other words, he has had in his possession two cars of the R. J. Reynolds Tobacco Company during his employment?

A. That is right. I think I must qualify that answer. Without examining our records, I would be unable to say whether there were just two cars or whether there had been a series of cars that had been delivered to him between February, 1938, and February, 1942.

Mr. Merrill: We object to the next question if the Court please, our thought is that the Court should consider this at this time before it is given to the jury in any way. We object to it as it is wholly immaterial and improper under the present set-up of this case.

The Court: You may read the question down to and including the word "accident" and then read "in April, 1939, is that right?" [242]

Mr. Davis: If I make the proper showing, then I presume that I may re-ask the question?

(Deposition of E. A. Darr.)

The Court: Yes, if the proper showing is made, I will permit it.

Mr. Davis: So that I may do this in accordance with the ruling of the Court, may I approach the bench and go over this?

The Court: Yes, counsel may approach the bench.

“Q. The first car that the R. J. Reynolds Tobacco Company delivered to Mr. Hair was the car in which he was involved in the accident in April, 1939; is that right?

Mr. Merrill: Now, we object to that as incompetent, irrelevant and immaterial and not proper cross examination and is not in anywise justified by any of the pleadings of this case.

The Court: He may answer.

“A. I would have to check the records to see if it was the identical car.

Q. But it was a car of the R. J. Reynolds Tobacco Company? A. It was.

Q. Whatever car he might have been using at that time? A. That is right.

Q. And the car that you delivered to him in February, 1942, of the R. J. Reynolds Tobacco Company is the car that is [243] involved in the injury of the plaintiffs' intestate in this particular accident?

A. That was my understanding.

Q. Have you ever seen Rulon D. Hair yourself?

A. No, not to my recollection.

Q. Under whom does he work in that territory?

(Deposition of E. A. Darr.)

A. His division manager is L. R. Donnelly.

Q. Has Mr. L. R. Donnelly been division manager in that territory all the while since Rulon D. Hair became employed by the R. J. Reynolds Tobacco Company? A. He has.

Q. Does Mr. Hair make his reports to the division manager, Mr. Donnelly, or does he make them direct to the company? A. Both.

Q. He delivers you a copy, or Mr. Donnelly a copy of the reports that he sends in from his work and business; is that right?

Mr. Merrill: We object to that as not proper cross examination, it is incompetent, irrelevant and immaterial and no proper foundation is laid.

The Court: He may answer.

“A. That is right.

Q. So Mr. Rulon D. Hair then works and operates under Mr. L. R. Donnelly as division manager of that particular territory?

A. That is right, plus his direct connection with this office. [244]

Q. But Mr. Donnelly, the division manager, is his direct superior officer in the operation of the business for the R. J. Reynolds Tobacco Company; is that right? A. That is right.

Mr. Merrill: We object to the next question upon the same grounds as heretofore urged, that it is incompetent, irrelevant and immaterial and it is not proper cross examination, and that it is contrary to the ruling heretofore made.

The Court: I think at this time I will hear you

(Deposition of E. A. Darr.)

on this matter, I think perhaps the entire question is admissible but I will hear you on it now. I will excuse the jury and ask them to remain within call of the Bailiff.

(The following proceedings had in the absence of the jury.)

The Court: The matter that the Court was a little in doubt about was the matter of the accident that Mr. Hair had in April, 1939. The Ninth Circuit Court of Appeals in commenting on the evidence in this case, in their opinion, at the top of page 770, of 145 Fed. 2nd, they say: "At an earlier time he had an accident while returning from a visit to a night club in a company truck. On that occasion he had a male guest with him. The accident resulted in the killing of a pedestrian and in Hair's arrest on a criminal charge. The employer was fully advised of the facts of that incident, but Hair's known violation of the rule did not eventuate in his dismissal. His services were retained at Donnelly's suggestion, apparently because he was thought to be a good salesman." I take it that under the decision rendered in this case that the main objection to that testimony was on the instruction given by the Court that they could take that incident standing alone as evidence to prove that he was a reckless driver, but that it was admissible in support of the knowledge on the part of the Reynolds Tobacco Company and Mr. Donnelly that the rule as to hauling guests had been violated. I also take it that the position of

(Deposition of E. A. Darr.)

Mr. Merrill and Mr. Smith is that the evidence is not admissible at all.

Mr. Merrill: That is true, and knowing as Court and counsel knows now that there was only one incident here, it would be wrong to permit it to go to the jury and then correcting, or attempting to correct it by instruction to the jury.

The Court: Unless the evidence was different in this case, the matter of reckless driving could not be submitted to the jury, but this testimony has been used and mentioned by the Circuit Court of Appeals on the question of knowledge to the Company as a waiver of the rule on hauling guests. [246]

Mr. Davis: The only evidence which the Circuit Court held was improperly admitted was the certified copy from Clark County. That is the only ruling that the evidence was improperly admitted in this case. That was on the evidence at that time but if there was more evidence, then you would have to pass upon that now.

Mr. Merrill: Now, if I may read a portion of the decision of the Circuit Court of Appeals.

The Court: Yes.

Mr. Merrill: At page 769 the Court says: "We have concluded that the judgment must be reversed because of error in the reception of proof concerning Hair's previous record as a driver and because of the submission of that issue to the jury."

The Court: That is right, on that one issue.

Mr. Merrill: That has to do with the Myers' incident.

(Deposition of E. A. Darr.)

The Court: No, that is a question of having a guest with him. He had a guest with him at the time Myers was killed. The way I interpret this decision of the Circuit Court is that they don't hold that the admission of that testimony was error because they used that testimony in support of their decision on [247] the other question.

Mr. Davis: On the question of waiver of the instruction to Hair.

The Court: Yes. I understand, Mr. Davis, that you will want to connect this up with further testimony.

Mr. Davis: Certainly. I am in good faith; I expect to show by evidence that I will elicit from the defendants themselves that Mr. Donnelly did know that Mr. Eckersley was in the car.

The Court: Well, we will proceed now, you may ask the question.

Q. You did know, Mr. Darr, that Rulon D. Hair was involved in an accident with the R. J. Reynolds Tobacco Company truck on or about April 11, 1939, in which a man named Myers was killed?

Mr. Merrill: To which we object as being incompetent, irrelevant and immaterial. No foundation has been laid of any kind of character, and on the ground also that it is prejudicial to the rights of the defendants in this case.

The Court: He may answer.

A. Yes.

Q. Mr. L. R. Donnelly was the Division Manager at that time? [248]

A. That is right.

(Deposition of E. A. Darr.)

Q. I believe a suit was brought against the R. J. Reynolds Tobacco Company with the same defendants in that particular case as are the defendants in this case?

Mr. Merrill: Objected to as immaterial and incompetent for any purpose whatever and it is not connected with any matter on direct examination and it not proper in any sense as cross examination. It is not connected with any evidence or matters involved here and is prejudicial to the rights of the defendants.

The Court: He may answer.

A. I cannot answer without referring to the file as to whom the suit was brought against.

Q. Have you a record of the pleadings or the papers that were served on the R. J. Reynolds Tobacco Company in that suit?

Mr. Merrill: The same objections to that question.

The Court: He may answer.

A. It appears from the correspondence that Donnelly was joined as a defendant with the Company and Hair.

Q. You do not have a copy of the court pleadings in that case?

Mr. Merrill: To which we make the same objection as made to the question previously objected to. [249]

The Court: Overruled.

A. Well, not all the court pleadings. We have got here probably a copy of the complaint.

(Deposition of E. A. Darr.)

Mr. Merrill: We move to strike the answer on the ground that it is incompetent, irrelevant and immaterial and prejudicial.

The Court: Motion is denied.

Q. Was that complaint served on the R. J. Reynolds Tobacco Company?

Mr. Merrill: Objected to on the same grounds as made to the former question and that it deals with matters foreign to this suit and calls for a conclusion of the witness.

The Court: He may answer.

A. I am sure that it was.

Mr. Davis: I would like to offer a copy of the complaint in the Myers' case.

Mr. Merrill: We object to this offer on the ground that it is incompetent, irrelevant and immaterial for any purpose and it is prejudicial and not within the issues in this case.

The Court: Sustained.

Mr. Davis: Will the Court give me the right, if the showing is sufficient to justify it, to offer such portions of the complaint as would be [250] proper to show notice to the Company?

The Court: Yes, I will grant you that permission.

Q. Mr. Darr, when did you receive a report as to the accident in April, 1939? April 11, 1939?

Mr. Merrill: Objected to on the same grounds as heretofore stated.

The Court: He may answer.

A. On April 15, 1939.

(Deposition of E. A. Darr.)

Q. From whom did you receive that information?

Mr. Merrill: I would like to have a definite understanding that we may have an objection to each of these questions on the same grounds that we have heretofore objected on, with the right to interpose any additional objections we might have.

The Court: Yes, you may have that understanding. You will mention your objections of course. You may answer the last question.

A. From L. R. Donnelly.

Q. He is the same L. R. Donnelly, your division manager?

A. That is right.

Q. Did you have an investigation made of that accident which resulted in the death of Mr. Meyers?

Mr. Merrill: We object to that as incompetent, irrelevant and immaterial to any issue here and it is [251] not proper cross examination, in addition to the previous objection stated.

Q. The Court: He may answer.

A. We received a complete report from Mr. L. R. Donnelly, and also from Mr. C. C. Roe, department manager, under whose supervision both Mr. Donnelly and Mr. Hair were working.

Q. Did you receive more than one report from Mr. Donnelly or Mr. Roe as to this accident on April 11, 1939?

Mr. Merrill: Same objection.

The Court: Same ruling.

A. We received the initial report of the accident, and we received supplemental reports.

(Deposition of E. A. Darr.)

Q. How many supplemental reports did you receive?

Mr. Merrill: The same objection.

The Court: Same ruling.

A. Well, there were quite a number of letters and telegrams in regard to developments in the case.

Mr. Davis: We would like to offer those exhibits, seven exhibits introduced as Plaintiffs' Exhibits B, C, D, E, F, G and H.

Mr. Merrill: We object to the offer as incompetent, irrelevant and immaterial, prejudicial and not having to do with the issues or parties here.

The Court: Overruled. [252]

Mr. Davis: I will read Exhibit B into the record:

“Plaintiffs' Exhibit B.

Tobaccos; Plug, Twist, Smoking, Cigarettes,
Products

R. J. Reynolds Tobacco Co.

April 17, 1939

Salt Lake City, Utah

Mr. Chas. C. Roe,

Enclosed please find a newspaper clipping that was cut from local paper. You will please note how the papers are playing up this accident. I know that the clipping is all wrong because I investigated the accident myself. I will try to give you an account of the accident.

Mr. Hair after leaving a cafe not quite a block away started to drive home going east on main

(Deposition of E. A. Darr.)

street, after going across the following street a man loomed up in front of him from between two cars coming from the right curbing, Mr. Hair immediately applied his brakes that were in good working order and swerved his car to the left the same time to try to miss the man. The man became confused and dodged back and forth and finally Mr. Hair hit the man a little to the left of the center line.

Mr. Hair was on the left because he tried to miss the man that was coming from the right. You are well acquainted with the narrow streets in Pocatello and one doesn't have to go far to be over the [253] center line as there are only room for two cars on these streets, opposite each other.

After hitting the man Mr. Hair stopped within twenty-five feet (car length) and then drove on a little farther to find a parking place along the curbing as there were cars lined up on both sides of the street. The distance he had to go to find this parking place was a little over 200 feet, the paper would make you believe that Mr. Hair could not stop within this distance. The police tried to place a drunken driving charge on Mr. Hair but this would not stick as they examined him and could not find that this was true, so they took this charge off and placed a manslaughter charge against him. The police had the company car parked on the street so every one could see it and cause public sentiment against Mr. Hair to strengthening their case against him. When I got to Pocatello I tried to have the car released but they only got tough about it and so

(Deposition of E. A. Darr.)

did I, they thought they could pull a bluff. It was late, around 10 P. M. Saturday so on Sunday I again went to the police station and pulled a bluff on them, I told them I was having papers drawn up not only to have our property placed in a garage to safeguard the tobacco in the truck but also was looking over the matter of the unjust advertising that was being created by our car out [254] on the street. I intimated that there might be a suit brought against the city due to this sentiment that was being caused against the company. Well they couldn't release the car fast enough. I placed it in a garage and invoiced the tobacco in it and took the tobacco over to Rino Cando Co., for storage. The car is damaged in front quite a little will have to have a new radiator and the engine gone over. I am having the Chevrolet dealer give me a bid on this car and then will find out how much it will take to have it repaired and will decide what is the best thing to do with it. I cannot have the car repaired until the first hearing that will take place on Wednesday or Thursday. I drove back to Salt Lake late Sunday and will work with Craig Tuesday on my way up to Pocatello. I will stay for the first hearing as no doubt they will call me for a witness and then set the time for the final trial.

My car is about to fall to pieces so will pick up a coupe in Ogden on my way through there. The one that we bargained for the sedan delivery will come in later. Yours very truly. L. R. Donnelly."

(Deposition of E. A. Darr.)

Mr. Merrill: We move now that the entire exhibit be stricken and the jury instructed to disregard it. Your Honor will notice that there isn't a word in that letter that could be interpreted as having [255] anything to do with this so-called waiver of instruction. It has to do entirely with the incident that we have heretofore called to Your Honor's attention and it is wholly incompetent, irrelevant and immaterial. We urge the striking of it, it is entirely immaterial for any purpose.

The Court: Motion denied.

Mr. Davis: Now, I offer Exhibit C as shown in the deposition and will ask permission to read it into the record at this point.

Mr. Merrill: We object to it as being incompetent, irrelevant and immaterial and prejudicial.

The Court: It may be admitted.

“Plaintiffs' Exhibit C. (Reporter's note: This is a regular Western Union Blank with tape glued on) Western Union. Received at CFA3 11—Salt Lake City Utah 15 730A R. J. Reynolds Tobacco Company, Winston Salem N. Car. R. D. Hair car struck and killed man Pocatello Particulars later. L. R. Donnelly.”

Mr. Merrill: We move that be stricken and the jury instructed to disregard it on the ground that it has nothing whatever to do with any of the issues in this case. It cannot be interpreted in any way as tending to prove any so-called, or attempted waiver or what might be argued as a waiver in this case—

(Deposition of E. A. Darr.)

I refer to the waiver of the instruction as to the [256] hauling of a guest.

The Court: The motion is denied.

Mr. Davis: I now offer Exhibit D as shown in the deposition and made a part of the deposition.

Mr. Merrill: To which we make the same objection as to the previous exhibits.

The Court: Overruled, it may be admitted.

“Plaintiffs’ Exhibit D. Tobaccos; Plug, Twist, Smoking, Cigarettes, Products R. J. Reynolds Tobacco Company. Denver, Colorado, April 18, 1939. R J R I am attaching hereto a letter just received from Mr. Donnelly which is self-explanatory, together with a clipping relative to Mr. Hair’s accident in Pocatello.

You will notice Mr. Donnelly states the car is damaged to quite an extent, and it would be my suggestion instead of having it repaired, get offers from Chevrolet dealers in Pocatello and Ogden, and plan on replacing this car with a new Chevrolet Sedan Delivery.

Regardless of who is placed in the Pocatello assignment, if a new car is purchased he would not want to be driving a car around the streets that had had a misfortune such as the old one. In other words we would be starting out with a clean slate, and naturally it would also help to hold down comments, etc. Yours very truly Chas. C. Roe.”

Mr. Merrill: Now, we make the same motion [257] to strike, on the same grounds that were stated in our last motion to strike.

(Deposition of E. A. Darr.)

The Court: The motion will be denied.

Mr. Davis: I now offer Exhibit D as shown in the deposition and made a part of the deposition.

Mr. Merrill: To which we object upon the same grounds that we objected to the other exhibits and upon the grounds included in the motions to strike.

The Court: It may be admitted. You may likewise read that into the record.

“Plaintiff’s Exhibit number E. Tobaccos: Plug, twist, smoking, cigarettes. Products R. J. Reynolds Tobacco Co., Denver, Colorado April 18, 1939 R J R No doubt you have received word from Mr. L. R. Donnelly of Salt Lake City, relative to the car wreck that Mr. R. D. Hair had early Saturday morning, April 15.

Just as soon as Mr. Donnelly received word of this wreck he wired me brief details of what happened. I replied by wire for him to proceed to Pocatello and get full information as I planned on calling him long distance to see what actually took place.

Sunday afternoon, April 16, I called Mr. Donnelly in Pocatello and he informed me Mr. Hair had taken his wife to the station to catch an early morning train at 4:00 A M and as he was returning back through town on [258] Main street, which is a very narrow street, a street worker walked out between two cars. Mr. Hair ran into him which caused the street worker’s instant death. Mr. Donnelly stated that this street worker was an old man, about seventy years old and could not see or hear very well, however, both the street worker and Mr. Hair prob-

(Deposition of E. A. Darr.)

ably thought no one else was out or around at that hour of the morning, which caused this accident.

I called the Maryland Casualty Company early Monday morning and gave them what information I had and they wired their San Francisco Office the information I gave them.

Mr. Donnelly was not sure just when the hearing was to be held, either Monday or Tuesday of this week, but from the talk that was circulating around Pocatello, he thought Mr. Hair would be charged with manslaughter. I instructed Mr. Donnelly we would make no attempt to replace Mr. Hair until I arrived in Salt Lake City this week end, at which time I expect to have full information. Yours very truly, Chas. C. Roe. CCR: cas''

Mr. Merrill: I now move to strike the exhibit for the reasons stated in our other motions to strike.

The Court: Denied.

Mr. Davis: I offer Exhibit F which is a part of the deposition, and ask permission to read it [259] into the record.

Mr. Merrill: We object to the offer on the same grounds that we urged to the other exhibits and the grounds stated in our motions to strike.

The Court: It may be admitted.

“Plaintiff’s Exhibit Number F. (Reporter’s note: This is a regular postal telegraph blank with tape glued on.)

Postal Telegraph. CHA 19 59 NL XU—Salt Lake City Utah 23. R. J. Reynolds Tobacco Company.

(Deposition of E. A. Darr.)

Winston Salem, North Carolina. 1939 April 23,
P. M. 10 45

Hair is out on bond trial will be next month. Donnelly thinks he will come clear. Would you consider him to continue until outcome is known. Donnelly regrets losing Hair due to his sales ability and past results. If possible would recommend we let Hair continue Can have car repaired for small expense for time being. Wire Instructions. Chas C Roe''.

Mr. Merrill: We make the same motion to strike on the same grounds as heretofore urged.

The Court: Denied.

Mr. Davis: I am now about to offer Plaintiffs' Exhibit G as shown in and made a part of the deposition.

Mr. Merrill: To which we object on the [260] grounds stated in our previous objections and in our motions to strike.

The Court: Overruled, it may be admitted.

"Plaintiffs' Exhibit number G. Confirmation of serial message sent via Postal Telegraph Company. From R. J. Reynolds Tobacco Company Manufacturers of Cigarettes Smoking Plug and Twist Tobaccos Winston-Salem N C. Date April 24, 1939. Mr. Chas. C. Roe, c/o L. R. Donnelly, 532 Judge Building, 8 East Broadway, Salt Lake City, Utah.

Since Hair was using company car on personal business our disposition is to get his resignation. However, willing approve your recommendation as to continuing him provided he agrees to pay full cost repairs to company car. 2:15 P. M. EAD—h f''

(Deposition of E. A. Darr.)

Mr. Merrill: May our motion go to this also?

The Court: Yes, with the same ruling.

Mr. Davis: I am about to offer Plaintiffs' Exhibit H, which is a part of the deposition of Mr. Darr.

Mr. Merrill: To which we interpose the same objection as to the previous exhibits and also on the grounds stated in the motions to strike.

The Court: The objection will be sustained to this exhibit.

Mr. Davis: May I call Your Honor's attention to the second paragraph on page eight, I wanted to [261] offer this for the purpose of showing what Mr. Hair's activities were and that it was reported to the Company.

Mr. Merrill: It would be immaterial for any purpose. It has no bearing on any of the issues here and would be prejudicial, and we also object on the other grounds heretofore stated.

Mr. Davis: I will withdraw the offer at this time and ask the Court that I may have permission to re-offer this at a later time. I believe I will be able to introduce matter which will entitle me to offer this.

The Court: Yes, that may be understood, but I will sustain the objection at this time.

Mr. Davis: I have withdrawn the offer.

The Court: Very well.

Mr. Davis: Now I will continue with the deposition.

Q. Mr. Darr, did those reports or your informa-

(Deposition of E. A. Darr.)

tion show that Mr. Rulon D. Hair had with him at the time of the wreck of April 11, 1939, a guest in his car?

A. It showed that he did not have a guest with him at the time of the accident.

Q. Didn't you learn later that a man by the name of Esterly was a guest in the car at that time?

A. I have never received any such information. [262]

Q. Mr. L. R. Donnelly attended the preliminary trial in which Hair was indicted for manslaughter, didn't he?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and has no bearing on any issue in this case. It is prejudicial and not proper cross examination.

The Court: He may answer.

A. I am unable to say.

Q. You don't know whether he was there or not?

A. I do not know.

Q. Do you know that it was shown in the evidence of that trial there was a man by the name of Esterly or some other guest with him at the time of that accident.

A. I do not.

Q. You don't know that it was shown in the evidence of that trial there was a man by the name of Esterly or some guest with him at the time of the accident?

A. I do not.

Q. You never had any such information?

A. No.

Q. You knew that Hair was convicted of man-

(Deposition of E. A. Darr.)

slaughter, did you not, in the criminal courts of Idaho, in that particular wreck?

Mr. Merrill: That is objected to as incompetent, irrelevant and immaterial; it is prejudicial [263] and has no bearing on any issue properly before the Court in this case, this is made in addition to any other grounds stated to our objections heretofore made to this line of testimony.

The Court: Objection sustained.

Q. Don't you know, Mr. Darr, that he was convicted of involuntary manslaughter and paroled for a period of two years?

Mr. Merrill: We make the same objection.

The Court: Sustained.

Q. Did you or the R. J. Reynolds Tobacco Company ever receive a report from the Parole Officer who had charge of the case of Rulon D. Hair?

Mr. Merrill: We make the same objection to this question.

The Court: Sustained.

Q. Well, you knew, Mr. Darr, didn't you, that upon the conviction of Rulon D. Hair for manslaughter as the result of the wreck or accident of April 11, 1939, that his license to drive a car would be cancelled, didn't you?

Mr. Merrill: We object on the same grounds as our other objections which were sustained. We feel that this should not be read to the jury.

The Court: Sustained.

Q. Do you know that Mr. Rulon D. Hair had a license to operate an automobile? [264]

(Deposition of E. A. Darr.)

Mr. Merrill: The same objection as heretofore made.

The Court: Overruled.

A. I did not. I assumed that he had.

Q. You had no record of that at all?

A. No.

Q. From the time he first was employed by the company, up until this last accident?

A. We don't require that proof to be given us that a man has a license. We assume that he has one.

Mr. Davis: I take it that the Court would sustain an objection to the next question so I will not read it. I will read the question at the bottom of page 41.

Mr. Smith: The Court has ruled out that question and answer.

Mr. Davis: Very well, I will forego that. Now, the first question on page 42 of the deposition.

Q. Did you know that Mr. Rulon D. Hair was convicted of reckless driving on July 22, 1929, at and near Boise, in the State of Idaho, and fined \$50.00 and the cost?

Mr. Merrill: That is objected to as being prejudicial?

The Court: Sustained.

Q. Did you know that the record of that indictment was [265] published in the Idaho Falls Post Register of that date?

Mr. Merrill: The same objection.

The Court: Sustained.

Q. Mr. Donnelly or no superior officer never made any notice of that fact, or report of that fact to you, did they? A. No, sir.

(Deposition of E. A. Darr.)

Q. I believe you stated in a former interrogatory that you did have on one occasion a statement that Mr. Hair had had his wife as a guest on some trip to a station? I believe that is right, isn't it?

A. That was in connection with the April 1939 accident. He had taken his wife and daughter to the station, and the accident occurred on his way home.

Q. When did you get a report of the accident of September 11, 1942, in which Avenell Newby was killed?

A. The notice was—the notice to us was received on September 17, 1942, in a letter from Mr. Donnelly, letter of the 15th.

Mr. Merrill: That is objected to as being incompetent, irrelevant and immaterial; not proper cross examination and it is prejudicial.—I will make this in the form of a motion to strike the answer.

The Court: Motion denied. [266]

Mr. Davis: I am now reading from the deposition: "we would like to introduce that letter in evidence. Letter of September 15, 1942, from Mr. Donnelly marked "plaintiff's exhibit No. I, (eye). This exhibit is attached to the transcript."

Now, if the Court please, I offer that identical exhibit marked Exhibit 14 and which was attached to the transcript.

Mr. Merrill: We object to the admission of the exhibit as it is incompetent, irrelevant and immaterial, and it is not proper cross examination.

(Deposition of E. A. Darr.)

The Court: It may be admitted.

“Tobaccos: Plug, Twist, Smoking, Cigarettes, Products R J Reynolds Tobacco Company. Office of L. R. Donnelly, 213 Judge Building, P O. Box 1115. He had accident in April 1939 in which pedestrian was killed, R D M. Salt Lake City, Utah September 15, 1942. R J R. As a matter of information concerning an accident involving Mr. R. D. Hair in which his car was completely demolished and considerable of his merchandise lost or stolen.

Mr. Hair called me Saturday morning September 12 and informed me that he had had an accident twenty two miles north of Montpelier, Idaho. Since Mr. Hair did not give me all the details of the accident when he [267] called me, I naturally assumed that the accident was one of the usual nature. I had car number 8712 taken out of dead storage and serviced with the expectation of turning this car over to Mr. Hair. However, upon my arrival at Montpelier at 12:00 noon further details came to light upon my investigating further.

While Mr. Hair was traveling south on highway number 30, twenty-two miles north of Montpelier he approached a semi-truck and trailer which was over the center line thus causing Mr. Hair to drive onto the shoulder of the road which had become soft due to heavy rains. This threw his car somewhat out of control and in the interim he hit a rock with his right front tire causing it to blow out. This then caused his car to become completely uncontrollable. The car rolled over several times scattering tobacco

(Deposition of E. A. Darr.)

and cigarettes all over the highway. A married woman passenger whom Mr. Hair had picked up was severely injured and was in need of immediate medical attention,—this he did not mention in his first report—as was also Mr. Hair since he received a blow on his left ear. A passing motorist took them both to a hospital in Montpelier, Idaho, where medical attention was administered. After receiving medical attention Mr. Hair notified the Sheriff of the accident, but apparently before the wrecker arrived at the scene of the [268] accident some of the merchandise was stolen by several passing motorists, according to eye witnesses at the scene of the accident. A list of the merchandise stolen will be sent to you along with his financial obligations to the jobbers.

After conferring with the doctor who was taking care of the woman involved I was informed that her condition was very serious and that she had a fifty-fifty chance of surviving. Her injuries are internal and she is so seriously injured that X-rays are impossible at the present time.

Since Mr. Hair violated all Company rules and instructions concerning the carrying of passengers I felt that I had to ask for his resignation which I did. His resignation is enclosed with other papers relative to the accident.

In car number 8712 I took all the tobacco that was left and traded it in against outstanding receipts to a jobber located at Pocatello, Idaho.

Two bids which I received on the wrecked car are

(Deposition of E. A. Darr.)

enclosed and because—car record attached,—of a time limit set by the bidders immediate action concerning acceptance is paramount. The towing charges on the wrecked car were paid by me and reported on my report. The car is in dead storage at Ford Garage at Montpelier [269] Idaho. Yours very truly,
L. R. Donnelly'' and there are the initials C C;
C C R

Q. Is that the only report you received as to this accident?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.

The Court: He may answer.

A. Well, we received a regular form of accident report that salesmen are supposed to submit when they have an accident, and we received one of those from Mr. Hair. In fact, we received two,—the first reports an accident and it doesn't show he was carrying a passenger.

Mr. Davis: There were attached to the transcript of the deposition exhibits marked J and K and I now offer exhibit marked 15 which was J in the deposition.

Mr. Merrill: To which we object as being incompetent, irrelevant and immaterial and not proper cross examination.

The Court: It may be admitted.

Mr. Davis: May I have the privilege of reading only a portion of this, that was our agreement.

Mr. Merrill: Certainly.

(Deposition of E. A. Darr.)

Mr. Davis: "Notice,—In the event of an accident however slight, fill out this blank in detail and mail to office named below. [270]

Report of Automobile Accident.

Name of Owner: R. J. Reynolds Tobacco Company

Business Address: Winston-Salem

Home address: Winston-Salem, State: North Carolina.

Date of Accident: September 11, 1942.

Name of person in charge of machine: R. D. Hair.
Age: 30. Business address of person in charge of Machine: 209 South 7th.

Home address of person in charge of Machine: 209 South 7th. City: Pocatello, State: Idaho.

Manufacturer's name Chevrolet. Model; 1941.

Engine No. A A 517 606. Manufacturer's No. 6AG02-15629.

License No. 3A150. Was operator licensed? Yes.

For how long had he operated an automobile? 12 years.

In what direction was your vehicle going? South.

Rate of speed. 40 miles. Was driver on own business or that of owner? Owner. What side of street? Extreme right side." There is a good deal more to the report which I do not think is pertinent and I will not read it at this time. It is signed by R. D. Hair.

I will now offer in evidence Plaintiffs' Exhibit 16.

Mr. Merrill: To which we object on the ground

(Deposition of E. A. Darr.)

that it,—well I will make the objection on the same grounds as made to the previous exhibit.

The Court: It may be admitted. [271]

Mr. Davis: "Report of Automobile Accident.
Name of owner: L. R. Donnelly.

Business Address: 532 Judge Building, Salt Lake City.

Home address: 1365 East 13th South; City: Salt Lake City; State: Utah.

Date of accident: 9-11-42. Hour: 4:15 P. M.

Name of person in charge of machine: R. D. Hair
Age: 30.

Business address of person in charge of machine:
229 South 7th. Home address of person in charge
of machine: Same City, Pocatello, Idaho.

Manufacturer's name: Chevrolet. Model: 1941

Engine No: AA517-606. Manufacturer's No.
6AG02-15629

License No. # 3A-150

Was operator licensed? Yes. For how long had
he operated an automobile? 12 years.

In what direction was your vehicle going? South.

Rate of speed. 40 miles

Was driver on own business or that of owner?

Owner

What side of street? Extreme right side.

Were you blowing a horn or sounding a gong at
the time? No.

Were all your light lit? No.

If a collision in what direction was other vehicle
going? North.

(Deposition of E. A. Darr.)

What side of street? Right and center. Rate of speed? [272] Unknown.

Who was operator of other vehicle? He wasn't aware of accident.

License number of other vehicle? And didn't stop.

Who was to blame for the collision? Soft shoulder and rain

Injured's name? Avenell Newby. Address: Montpelier.

Injuries: Internal injury, unknown.

Which injured was in your car? Avenell Newby.

Where taken after the accident? Bear Lake Hospital, Montpelier, Idaho.

Was Doctor called? If so, Who? R. B. Lindsay. Address: Montpelier, Idaho

Describe damage to property other than your own? None.

To what extent was damage done to your property? Body total wreck.

Cause of accident Soft shoulder, rain and blown out tire."

The rest I am not going to read. I will continue with the questions and answers in the deposition.

"Q. Were any other investigations made by the R. J. Reynolds Tobacco Company or anyone for them other than Mr. Donnelly's report?

A. No further investigation made since his resignation was immediately requested.

Q. I am talking about the accident, though. Was any other report made of the accident other than Mr. Donnelly's?

(Deposition of E. A. Darr.)

Mr. Merrill: Objected to as incompetent, [273] irrelevant and immaterial and not within the issues. It calls for a conclusion of this witness and no foundation is laid.

The Court: Sustained.

Q. Mr. Darr, was this automobile registered there in the name of the R. J. Reynolds Tobacco Company or Mr. L. R. Donnelly?

A. L. R. Donnelly.

Q. The title to the car, though, was really in the R. J. Reynolds Tobacco Company?

A. Legal Title was in L. R. Donnelly.

Q. Well, is that the way you handle your cars in the territory of your salesmen, you put them in the name of the Division managers?

A. I think that is universal. I think that is the general practice.

Q. But the title to the car was registered in the name of L. R. Donnelly?

A. That is right.

Q. But was really the property of the R. J. Reynolds Tobacco Company.

A. That is right.

Q. You say that you register all cars of the Company in the name of the Division Managers in the various territories.

Mr. Merrill: Objected to as incompetent, [274] irrelevant and immaterial for any purpose. Having nothing to do with the issues in this case.

The Court: Overruled.

(Deposition of E. A. Darr.)

A. That is the general practice. There may be some exceptions.

Mr. Davis: I will not ask the next question because the Court has ruled on that as a matter of pleading. I will turn to the middle of page 46.

Q. Was that any reason why the car would have been listed or registered in the name of L. R. Donnelly?

A. Cars are registered in Division Managers names merely for convenience.

Q. Did you give your division manager, Mr. Donnelly, instructions with reference to the salesmen under him using the automobiles?

A. Oh, yes.

Q. The same instructions that you gave to Hair with reference to riding guests? A. Yes.

Q. And if your division manager, Mr. Donnelly, or any Division Manager found that a salesman was violating or knew of a violation of the salesman with reference to the hauling of guests or passengers, then it would be his duty to report that to you, would it not? A. Yes.

Q. And if Mr. Donnelly had any such evidence there, he failed to report that fact to you, didn't he? [275]

A. That is right. We have had no such report.

Q. You never heard or no report ever came to you that Mr. Hair ever hauled any passengers, ever hauled any guests in the Company's car with the exception of his wife, when he brought her to a station and had the first wreck in 1939, and this last

(Deposition of E. A. Darr.)

wreck involved in this litigation in which Mrs. Newby was killed?

A. They are the only cases that have come to my attention or the attention of the company.

Q. Did any insurance company make any report to you as to the investigation of either one of these wrecks?

Mr. Merrill: Objected to upon the ground that it is incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. Was there anything in those reports with reference to Mr. Hair hauling passengers or drinking or being intoxicated?

A. Not that I recall.

Q. Mr. Darr, did you receive any information or notices of any other wrecks of the Company's car while Mr. Hair was using it in driving it, up until this last wreck? A. No, none at all.

Q. Did you receive any unusual repair bills?

A. None that would indicate any accident; otherwise, he would not have gotten three commendations for driving three years without an accident. [276]

Q. Who gave you the information for your answer to interrogatory number 30?

A. This information was reported by attorneys representing R. J. Reynolds Tobacco Company and L. R. Donnelly in this case as the result of investigation made by them.

Mr. Merrill: We move to strike that last as entirely incompetent for any purpose, it is irrelevant in this case.

(Deposition of E. A. Darr.)

The Court: It may be stricken.

Mr. Davis: I have no objection to it going out.

Q. Was Montpelier, Soda Springs and Grace, Idaho, in Rulon D. Hair's district or territory on September 11, 1942?

A. They were in his assigned territory on September 11, 1942.

Mr. Davis: Now, Your Honor, I take it that counsel is privileged to introduce the direct examination if they desire. Do you want me to read the examination for you Mr. Merrill?

Mr. Merrill: No, we will have Mr. Smith read our direct examination.

Mr. Davis: I will be glad to accommodate you if you want me to do it.

Mr. Merrill: May it be understood that we deem it necessary for the understanding of the jury that this direct examination be read at this time rather [277] than to permit various witnesses to come in between the two parts of the examination.

Mr. Davis: We have no objection to any procedure you want to follow.

The Court: It may be so understood.

(Whereupon the following deposition was read by Mr. Smith.)

“E. A. DARR

Called as a witness on behalf of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, having been first duly sworn on the Holy bible to

(Deposition of E. A. Darr.)

tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

Direct Examination

Q. Will you please state your name?

A. E. A. Darr.

Q. Where do you reside?

A. Winston-Salem, N. C.

Q. What is your present employment, Mr. Darr?

A. Manager of the Sales Department of the R. J. Reynolds Tobacco Company.

Q. How long have you been connected with the R. J. Reynolds Tobacco Company?

A. Twenty three and a half years.

Q. How long have you held the position as Sales Manager? [278]

A. Since December 1937

Q. Do you hold any other position with the R. J. Reynolds Tobacco Company other than Sales Manager?

A. I am also a Director of the Company, having been elected in December 1937.

Q. What are your duties generally, as Sales Manager, with respect to the Company's salesmen?

A. I have general supervision of all the salesmen all over the United States.

Q. Had Rulon D. Hair been acting as a salesman for the R. J. Reynolds Tobacco Company prior to September 11, 1942? A. Yes.

Q. When did he first become a salesman for the Company, if you know the approximate date?

A. He was employed July 20, 1937.

(Deposition of E. A. Darr.)

Q. Mr. Darr, is there any other officer of the Company besides yourself who would know anything about the transactions of Rulon D. Hair in his capacity as a salesman for the Company?

A. No.

Q. To which officer of the Company would such information come?

A. To this office.

Q. Is there any other officer of the Company other than to [279] yourself to whom such information would come? A. None.

Q. Which officer, if any, of the company, would have supervision of the instructions or rules that might be given to Rulon D. Hair from time to time regulating his activities as a salesman for the Company?

Mr. Davis: I will waive that objection.

A. No one but myself.

Q. Was a Chevrolet panel truck owned by the R. J. Reynolds Tobacco Company turned over to Mr. Hair in February of 1942 for his use as a salesman for the Company?

A. That is correct, February 8, 1942. He had previously had a car.

Q. He had previously had a car that belonged to the Company?

A. That is right. This just another car, a new car.

Mr. Merrill: With respect to matters pertaining to the car and the instructions given him relative to hauling guests in the car we are under the necessity

(Deposition of E. A. Darr.)

of introducing that from the deposition by reason of the testimony heretofore introduced by the plaintiff, being the cross examination of Mr. Darr, and we are introducing that with the definite reservation of all the objections which we have heretofore made to any of the questions and answers heretofore given [280] touching the Myers incident or any other incident that may be interpreted as showing in any sense a waiver of these instructions. We want it understood that we are preserving those objections.

The Court: That is your understanding. You fix this in the record the way you want it.

Mr. Merrill: We don't want these objections waived by reason of this testimony as to hauling questions.

The Court: The Court wants the jury to know all the facts on both sides of this matter. I don't want to prohibit counsel from making their record here. However, if you have objections to your own questions I don't know just how that will be handled by you.

Mr. Merrill: We have to put this in and I want to reserve our objections to the questions that Mr. Davis has interposed without any argument being later raised that we have waived those objections by introducing this deposition.

The Court: That is a matter entirely up to you as to how the matter is handled in the record.

Q. What instructions, if any, Mr. Darr, were given by the R. J. Reynolds Tobacco Company to

(Deposition of E. A. Darr.)

Mr. Hair as to hauling or carrying guests or passengers in this truck?

A. These instructions were contained in a printed form which [281] was signed by Hair at the time the car was turned over to him.

Q. You have before you the printed form signed by Mr. Hair about which you have just testified?

A. Yes.

Mr. Smith: The R. J. Reynolds Tobacco Company and L. R. Donnelly offer for identification the paper writing referred to by the witness, and ask that it be marked as defendants' exhibit.

Mr. Merrill: I guess it will be marked as number 17 here.

Mr. Smith: The defendants R. J. Reynolds Tobacco Company and L. R. Donnelly offer in evidence the paper writing just referred to, and ask that it be taken as a part of the deposition of witness E. A. Darr.

Mr. Davis: We have no objection. I know what it is.

Mr. Smith: "Salesman's agreement to whom car is delivered. R. J. Reynolds Tobacco Company, Winston-Salem N. C. This will certify that there was delivered to me this 8 day of February 1942, at Salt Lake City, Utah (State) one Sedan Del. Chev 6 1941 Model A A Sedan Del. Motor Number A A 517606, Silver Tag Number 9020, with the regular and special equipment, as fully explained in your letter of instructions which I have [282] carefully noted, and which I do hereby agree to observe in

(Deposition of E. A. Darr.)

operating car, and same will be followed to the best of my ability in making my services of more value as a salesman, while the car is in my charge. I further agree that I will be responsible for the car, its parts and equipment; and upon request will turn same over to you, your successor, or a duly authorized representative of R. J. Reynolds Tobacco Company.

(I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company's business as directed by my division manager. I understand that under no consideration am I to permit anyone save and except an employee of R. J. Reynolds Tobacco Company to ride with me in the said car.

(Witness L. R. Donnelly, Division Manager's signature.)

R. D. Hair, (Salesman sign here)''

There seems to be some other initials on this exhibit G. R. B, J. A. W; G. R. B; E. B. W and J. A. W.

Q. Was the Chevrolet truck referred to in this paper writing delivered to Mr. Hair by the Company at the time this paper was signed?

A. Simultaneously.

Q. Mr. Darr, is the prohibition against the hauling of pass- [283] engers and guests a general rule of the R. J. Reynolds Tobacco Company, applicable to all salesmen using company owned automobiles?

A. It is.

(Deposition of E. A. Darr.)

Q. Is that or is that not a fixed rule of the Company?

A. Fixed rule.

Q. Now, in addition to the paper writing offered in evidence as Defendant's exhibit 1,—it is admitted as exhibit 17 in this case,—were any other written instructions given by the R. J. Reynolds Tobacco Company to Mr. Hair with respect to his hauling guests or passengers in any vehicle belonging to the R. J. Reynolds Tobacco Company?

A. It is a matter of constant practice for the Company to keep salesmen reminded, both by direct communications and through division managers and department managers who supervise salesmen's work, that under no circumstances must they carry any passengers with them other than employees of the Company. On that point, here is a form letter dated November 4, 1937, which Mr. Hair received and of which we have his signed acknowledgment, where that rule is again called to his attention in the last paragraph, reading as follows: "You must not carry other passengers with you when using the car, except your Division manager or an employee of the Company." [284]

Q. Was a copy of the letter of instructions to which you have just referred, sent to Mr. Hair?

A. It was.

Q. Is this paper to which you have just referred, an exact copy of the letter of instructions and directions sent to him.

A. That is an exact copy."

(Deposition of E. A. Darr.)

Mr. Smith: The defendants R. J. Reynolds Tobacco Company and L. R. Donnelly offer for identification the paper just referred to by the witness and ask that it be marked Defendants exhibit 18.

The defendants R. J. Reynolds Tobacco Company and L. R. Donnelly thereupon offer their exhibit 18 in evidence and ask that it be taken as a part of the deposition of the witness E. A. Darr.

Mr. Davis: To which I have no objection, they don't need to show it to me. I am familiar with it.

It is printed in the deposition but this is not the instrument which is handed to me. As far as I am concerned it may be copied from the deposition.

The Court: We will take a ten minute recess and you can straighten this out.

4:25 P. M. March 20, 1945

Mr. Merrill: As a correction in the listing of the exhibits we wish to have the exhibit appearing in [285] the deposition and which is there attached as exhibit 2 considered now as defendants' exhibit 18.

The Court: I think it was so marked.

Mr. Davis: I have no objection to your reading it into the record.

Mr. Merrill: Let's have the reporter strike these remarks and start over. Now, we make the offer at this time, to conform with the other marking on the exhibit, we offer exhibit number 18 and ask that it be deemed so marked.

The Court: It may be so deemed marked.

Mr. Smith: "Defendants exhibit 18. Directors:

(Deposition of E. A. Darr.)

Jas. A Gray, President. R. E. Lasater, Vice president. J. W. Glenn, Vice President. John C. Whitaker Vice President. M. E. Motsinger, Secretary. S. Clay Williams, Chairman Board of Directors. W. N. Reynolds, Chairman Executive Committee. R. C. Haberkern, Purchasing Agent. L. F. Owen, Traffic Manager. H. S. Stokes, Supt Leaf Processing. P. Frank Hanes, Counsel. E. A. Darr Mgr. Sales Dept. R. J. Reynolds Tobacco Company, Winston Salem N. C. November 4, 1937. S-22 c-c-

To Our Salesmen Operating Automobiles:

We are sending you herewith accident report blanks. In case of accident, make out report of accident in triplicate, and send all three copies to your Division [286] Manager. In case you have a serious accident, report it to us by wire and follow up your wire with a report of accident as above requested by first mail.

In filling out the report blanks it is imperative that you answer fully every question appearing thereon. If an accident occurs and you are not at fault you should endeavor to secure settlement from the party causing the accident on the spot. As we do not carry insurance covering damage to our car, we therefore have to look to the other party for damages sustained by us.

You must not carry other passengers with you when using the car, except your Division Manager or an employee of the Company. R. J. Reynolds Tobacco Company. 'I'D walk a mile for a camel'."

Q. Mr. Darr, do you have the signed acknowl-

(Deposition of E. A. Darr.)

edgment of the letter of instructions just referred to which you received from Mr. Hair?

A. The original acknowledgment was sent to lawyers in connection with a previous case in 1939.

Mr. Merrill: We now offer to be marked as exhibit 19 the answer to this letter that has just been read.

Mr. Davis: No objection to its admission.

The Court: It may be admitted.

Mr. Merrill: I will read this exhibit 19 [287]

“Winston-Salem N. C. November 4, 1937. To Our Salesmen: We enclose S-22-c-c. As we desire to know that our salesmen thoroughly understand all notices, offers, letters and circulars mailed to them by us, we request that you give us, in your own language, over your signature, the points which you gather from the above enclosure. Yours very truly, R. J. Reynolds Tobacco Company. Town, Idaho Falls, State, Idaho, Date March 17, 1938. S-22-c-c. In case of an accident I am to fill out accident report in triplicate sending all three copies to my division manager. Or if it is a serious accident I shall wire you immediately following it up with the regular form.

I will answer every question fully and if the other car is at fault I will endeavor to make settlement on the spot.

I should never carry any passengers outside of my division manager. R. D. Hair, Salesman.

This report must have your immediate attention.

(Deposition of E. A. Darr.)

In this space name of your Division Manager.
L. R. Donnelly.

Q. Are they the same attorneys who are defending this present suit? A. Yes.

Q. As far as you know, do they now have that signed acknowledgment by Mr. Hair. [288]

A. It was sent to them.

Q. Did you have any knowledge or information that these instructions and rules of the Company with respect to carrying guests or passengers had been violated by Mr. Hair at any time?

A. In one instance only, in connection with an accident that the salesman had in April, 1939, when it was found that he had taken his wife and daughter in a Company car to the railroad station and had an accident on his return home.

Q. What action, if any, did the company take with respect to that violation, Mr. Darr?

A. We gave serious consideration to getting Mr. Hair's resignation; but after considerable thought, I decided to give him another chance. But we penalized him to the extent of making him pay \$70.95 repair bill to cover damage suffered by the company car.

Q. What instructions, if any, were given him at that time as to his observing this regulation or rule?

A. He was told by his Department Manager that if he was ever found to be carrying passengers in the future, there would be no second chance.

Q. Do you or the Reynolds Tobacco Company have any knowledge or information about any other occasion on which Mr. Hair hauled or carried any

(Deposition of E. A. Darr.)

passengers or guests in this [289] truck or any other truck owned by the Reynolds Tobacco Company?

A. None.

Q. Was any report ever made to you or to the Company to the effect that Mr. Hair had hauled a woman in the Company's truck in Dubois, Idaho, or at any other place?

A. No such report ever reached me or the Company.

Q. I direct your attention to an allegation in the complaint that the R. J. Reynolds Tobacco Company knew that Rulon D. Hair was in the habit of hauling guests in the Company's truck contrary to instructions, and I ask you if that allegation is true?

A. It is not true.

Q. Have you or the Company ever been informed of Mr. Hair being arrested on a charge of reckless driving?

A. No such report has reached me or the Company.

Q. Did you or the Company ever receive any information indicating that Mr. Hair was a careless or reckless driver?

A. Never have.

Q. What reports, if any, have you or the R. J. Reynolds Tobacco Company received concerning any accident in which Mr. Hair was involved while operating a Company truck or any other vehicle?

A. None other than the one in April, 1939, previously mentioned. [290]

Q. Is that the case in which some pedestrian was killed?

A. Yes, sir.

(Deposition of E. A. Darr.)

Q. What has Mr. Hair's record been with the Company as to being a careful and competent driver, Mr. Darr?

A. He has a record since April 1939, up to September 11, 1942, of having had no accident in connection with the Company car, and has received letters of commendation along with merchandise awards in April, 1940, April 1941 and April 1942, which he won as the result of having maintained a clear record.

Q. What form of recognition was given to him for this record?

Mr. Davis: I object to this as it calls for a self-serving declaration and it is immaterial. The witness has testified without objection that the man had a clear record, now this is a self service declaration.

The Court: He may answer.

A. I have before me a carbon copy of a letter addressed to Mr. Hair dated June 12, 1940, commending him on a 12 months clear record. A carbon copy of a letter dated July 16, 1941, commending him on a clear record for two successive years without an accident. And a carbon copy of a letter dated July 29, 1942, commending him on a three-year clear record without an accident.

Q. State whether or not the originals of these letters were mailed from this office, from your office as Sales [291] Manager, and under your supervision, to Mr. Hair on the dates indicated?

A. They were.

Q. Are those papers you have before you the

(Deposition of E. A. Darr.)

exact carbon copies of the originals of the letters mailed to Mr. Hair?

A. They are exact carbon copies so far as the filling in of Mr. Hair's name is concerned. The body of the letter is a form that we use, and is multi-graphed to save typing a great number of letters.

Mr. Smith: The defendants R. J. Reynolds Tobacco Company and L. R. Donnelly offer for identification the three paper writings referred to by the witness, and ask that they be marked as Defendants exhibits 3, 4 and 5 respectively.

Mr. Merrill: They would be marked 20, 21 and 22 now, and we offer them in evidence at this time.

Mr. Davis: We object to the introduction as they are self-serving, immaterial, incompetent, and hearsay. It has been testified here they sent him such letters, and they contain matters not competent in any way here.

Mr. Merrill: It is simply following up the testimony of the witness and corroborating him.

The Court: The objection is sustained. I can't see that they are material here. [292]

Mr. Merrill: May it please the Court. With reference to these exhibits we wish to renew our offer and call to your Honor's attention the fact that the plaintiffs themselves opened this up in reading the cross examination of this witness to the jury, on page 48 of the deposition which they produced, they got in evidence this answer: This is a part of the answer: "He would not have gotten three commendations for driving three years without an accident." The question was "Did you re-

(Deposition of E. A. Darr.)

ceive any unusual repair bills?" and the answer: "None that would indicate any accident; otherwise, he would not have gotten three commendations for driving three years without an accident."

They placed that in evidence and we have a right now to follow it up and produce the entire record.

The Court: I think that any commendation he received,—the fact that he did receive it would be immaterial. However, Mr. Merrill, if you think it is material I will admit them and the jury can judge the weight. However, they do seem immaterial to me at this time, but I will admit them.

Mr. Merrill: I will read them to the jury at this time. This is exhibit 20.

"June 12, 1940. Mr. R. D. Hair, 209 South 7th St., Pocatello, Idaho. [293]"

Dear Mr. Hair: We are greatly pleased at being able to send to you the enclosed card and key ring token as evidence of the fact that you have operated your Company car for a period of twelve months ending April 15, 1940, without an accident.

Thousands of automobile drivers in America are carrying or wearing tokens like this. Some have them engraved for '2 years' and a few for '3 years'. This simply means that for one year, or two years or three years, they have successfully done their share towards saving lives on the highways by keeping themselves out of accidents. They have so well lived up to the rules and ideals of safe driving that they have been able to keep out of

(Deposition of E. A. Darr.)

even those scrapes for which others would have been to blame.

These no-Accident awards are not easy to win. They almost always mean that the operator of an automobile who has merited these awards has put real thought and effort into the matter of driving safely. They are not given for 'good intentions' but are given only to those who have delivered the goods, a reward for definite accomplishment in dodging the hazards that are encountered daily on the highways.

So we congratulate you on your clean twelve months record, and we hope that this time next year we [294] can exchange the enclosed for a two year token.

With best wishes, we remain,"

Mr. Merrill: Now I will read from exhibit 21, defendants 21.

"July 16, 1941. Mr. R. D. Hair, 209 South 7th St., #4 Pocatello, Idaho.

Dear Mr. Hair: We are glad indeed to inform you that according to our records you are now eligible to receive the two year no accident award for having driven Company car for two successive years without an accident. It is with pleasure that we send you herewith your new emblem.

We congratulate you on this fine record and thank you for the part you have played in helping make the highways safer. We hope that next year this time we will have the pleasure of presenting

(Deposition of E. A. Darr.)

you with a three year emblem. With best wishes, we remain, Your very truly."

Mr. Merrill: I am now going to read from Defendant's exhibit 22.

"July 29, 1942. Mr. R. D. Hair, Box 1166 Pocatello, Idaho. Dear Mr. Hair: According to our records, as of April 16, you have driven a Company car for a period of three years without becoming involved in an accident. We want you to know that we appreciate the record thus made by you. We, therefore take great pleasure in sending you [295] our sincere congratulations and hope you will continue this fine record.

It is also with pleasure that we are sending you herewith the enclosed, which evidence the fact that you have operated a car for a period of three years without an accident.

We hope that these awards will be a constant reminder to you of the very definite fact that it pays to drive carefully.

May we, therefore, again offer you our congratulations and express the very genuine hope that we may have the pleasure of congratulating you on the completion of four years of proper and sane driving.

With our best wishes, we beg to remain. Yours very truly."

Q. Mr. Darr, I direct your attention to an allegation in the complaint that the R. J. Reynolds Tobacco Company knew that Rulon D. Hair was

(Deposition of E. A. Darr.)

a careless, reckless, and incompetent driver of an automobile, and I ask you if that allegation is true?

Mr. Davis: I object to this; the deposition has been read in its entirety up to this point and it has all been covered, this is repetition.

Mr. Merrill: Read the next question.

Q. Did you or the R. J. Reynolds Company ever acquire any [296] knowledge or information that Mr. Hair was in the habit of hauling guests in the Company's truck.

Mr. Davis: I have no objection except that this was all read and answered and gone over at least once and it seems to me that it is a question for the jury and not this witness.

Mr. Merrill: Read the next question, Mr. Smith.

Mr. Davis: I will read,—oh pardon me, I will object to the next question also, that deposition has all been read.

Mr. Merrill: Very well, that is all the direct examination. Do you want to read the re-direct examination, Mr. Davis?

Mr. Davis: No, it is yours, not mine. Go ahead and read it.

Redirect Examination

Q. Mr. Darr, I direct your attention to Defendant's 1, heretofore introduced in evidence, being entitled "Salesman's agreement to Whom Car is Delivered", and ask you if you know the two signatures appearing on this instrument?

A. I do.

(Deposition of E. A. Darr.)

Q. Whose signatures are they?

A. One is the signature of R. D. Hair and the other is the signature of L. R. Donnelly.

Q. Where has this paper been kept since it was executed, Mr. Darr? [297]

A. In our files, as a permanent record.

Q. Are those files kept under your supervision as Sales Manager for the R. J. Reynolds Tobacco Company?

A. They are.

Mr. Smith: That is the end of the deposition.

L. R. DONNELLY

recalled for cross examination under the rules, having heretofore been duly sworn, testifies as follows:

Cross Examination

By Mr. Davis:

Q. Mr. Donnelly, I am going to interrogate you concerning the letters introduced from Mr. Darr's testimony and for your information and in fairness to you, if you want to take the deposition and turn to page 34, I am going to ask you about a matter that appears there.

Mr. Merrill: We shall object to this, in any event it would necessarily be on their redirect in this case and not in the case in chief.

The Court: Overruled. I understand that he is called for cross examination under the rules.

(Testimony of L. R. Donnelly.)

Q. I refer to exhibit "E" being a letter from Charles E. Roe, and call your attention to the following: "Just as soon as Mr. Donnelly received word of this wreck he [298] wired me brief details of what happened. I replied by wire for him to proceed to Pocatello and get full information as I planned on calling him long distance." Did you receive that wire to come to Pocatello and get that information? A. I did.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and does not pertain to any issue of this case.

The Court: Overruled. The answer may stand.

Q. As a result of that wire you came up as suggested to Pocatello and made a complete investigation, didn't you? A. Yes, sir.

Q. You were representing Mr. Roe and going under instructions from him.

A. I was representing the Company.

Q. What is his position.

A. He was my immediate superior.

Q. I call your attention to the top of page 34 of the deposition of Mr. Darr to a letter from Mr. Roe in which he said: "I am attaching hereto a letter just received from Mr. Donnelly which is self explanatory, together with clipping relative to Mr. Hair's accident in Pocatello." You sent Mr. Roe the letter together with the [299] clipping from the newspaper, referring to the accident?

Mr. Merrill: The same objection.

The Court: The same ruling.

(Testimony of L. R. Donnelly.)

A. I did.

Q. Calling your attention to page 32 of the deposition of Mr. Darr. In the first paragraph of that letter you state: "Inclosed find newspaper clipping that was cut from local paper."

Mr. Merrill: The same objection as previously made.

The Court: The same ruling.

A. I said that, yes.

Q. That was from the local, the Pocatello Tribune.

A. I cannot say which paper but it was a newspaper.

Q. The paper published in Pocatello?

A. I obtained it here in Pocatello.

Q. You read the newspaper reports of this Myers' accident?

A. I read them after I made the investigation.

Q. In the letter you said that you knew that the clipping was all wrong because you had investigated the accident.

A. That is correct.

Q. And that is what you wrote?

A. Yes, sir.

Q. You read all the newspaper reports of the accident at that time?

A. I read some of them. [300]

Q. You were making a complete investigation to find out what the facts were?

A. Yes, that's right.

Q. You looked the matter up and tried to find out all the information you could?

(Testimony of L. R. Donnelly.)

A. Yes, sir.

Q. Tried to get all the information with reference to whether this man Hair hauled guests?

A. Yes, sir.

Q. Went to the Police station and demanded possession of your car?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. Yes, sir.

Q. And in your letter you stated that you went over and got tough with the Police Department and pulled a bluff on them.

Mr. Merrill: Objected to as the letter is the best evidence, and it is irrelevant for any purpose.

The Court: He may answer.

A. I tried to obtain the release of the car.

Q. Who did you talk to over at the police station?

A. I imagine it was the sergeant,—the man in charge.

Q. Did you ever see Mr. Pugmire, the chief of police? [301]

A. I have seen him.

Q. Did you talk to him at that time?

A. I don't remember.

Q. Didn't you ask Pugmire to give you the release of the automobile?

A. I asked someone, I don't know who it was.

Q. Did you say that you did or didn't talk to Chief Pugmire?

A. I don't remember.

Q. You knew Mr. Pugmire?

A. Yes, sir.

(Testimony of L. R. Donnelly.)

Q. Didn't tell you at that time,—you did say that you saw him? A. I have seen him, yes.

Q. Didn't Chief Pugmire tell you at that time that Mr. Hair was under the influence of intoxicating liquor when he struck Mr. Myers?

A. He did not.

Q. Didn't he tell you that Mr. Eckersley who was with him was also under the influence of liquor?

Mr. Merrill: We object to this testimony; it is entirely immaterial for any purpose in this case, and it is prejudicial.

The Court: He may answer.

A. No, sir.

Q. Didn't he tell you that he found intoxicating liquor in [302] the truck belonging to the Reynolds Tobacco Company?

A. Yes, he told me that. I will not say that it was Mr. Pugmire who told me, but it was some officer.

Q. You found out at the police station that they found intoxicating liquor in the car belonging to the Reynolds Tobacco Company?

A. That's right.

Q. You didn't tell Mr. Darr that in your report to him.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I don't recall.

(Testimony of L. R. Donnelly.)

Q. You found out that Mr. Eckersley was a passenger in that car, didn't you?

A. Yes, sir.

Q. And you didn't report that to the Company?

A. Not in this letter, no sir, I didn't.

Q. Then you did report to the Company later that Mr. Eckersley was a passenger in this car?

A. I reported it to Mr. Roe.

Q. You knew that Mr. Eckersley was a passenger in the car with Hair at the time you wrote this first letter?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. And Mr. Donnelly, you also knew that he wasn't going from [303] the station, and that statement wasn't true?

A. I reported that I found in the investigation, what I thought was the truth.

Q. Didn't you find out that he didn't take his wife to the station at four o'clock in the morning but that he had Mr. Eckersley with him and that they had been out to the El Rio club?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not within the issues.

The Court: He may answer.

A. Later on I found that he was in the car.

Q. Did you report that to your superior?

A. I reported it to Mr. Roe.

Q. You found from the newspaper that it was claimed that Mr. Eckersley, who was with him, was intoxicated?

(Testimony of L. R. Donnelly.)

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I don't remember what was in that clipping.

Q. You sent that clipping to Mr. Roe, didn't you? A. I sent a clipping to him.

Q. Now, Mr. Donnelly, referring to exhibit 23, Plaintiffs' exhibit 23, I will ask you to look at it. That is the newspaper report that you sent the clipping from, which was sent to Mr. Roe?

A. I wouldn't say. [304]

Q. Read it and see if it is the one you sent to him. Just read it to yourself.

A. It is a clipping, but I wouldn't say it was the clipping that I sent to Mr. Roe.

Q. You know, as a matter of fact, that is the clipping you sent. The one you sent when you said "you will note how the papers are playing this up". A. I do not know that.

Q. Did you read that when you were in Pocatello? A. I don't know that I did.

Q. Did you read similar accounts?

A. I read accounts of it.

Q. Did you read that or not, Mr. Donnelly?

A. I wouldn't say.

Q. You were reading newspaper accounts to get such information as you could, were you not?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

(Testimony of L. R. Donnelly.)

A. Yes, I read the accounts but I had made an investigation before it was published.

Q. You read this newspaper article?

A. I read newspaper articles.

Q. You read the newspaper article which has been shown you when you were here in Pocatello?

A. I read several, I wouldn't say I read this one. [305]

Q. You were reading all of them to find out what you could?

A. I wasn't buying all the newspapers. If they happened to be in the newspaper that I bought I read it.

Q. What is the date of the exhibit?

A. April 16, 1939.

Q. I call your attention to the letter dated April 17, 1939 and ask you if that refreshes your recollection any on this matter?

A. No, sir.

Q. You were in Pocatello on April 16th?

A. Yes, sir.

Q. You know that you were here on the 16th?

A. I don't know whether I was here on the 16th or the 17th.

Q. Do you know how many papers are published in Pocatello?

A. No.

Mr. Davis: I offer in evidence exhibit marked Plaintiffs' exhibit 23, that part of the exhibit which refers to the accident with reference to Jacob Myers. We offer it upon two theories: First, that the evidence is sufficient to justify its introduction on the theory that he sent this clipping at that

(Testimony of L. R. Donnelly.)

time, and, second, that it was in a newspaper of general circulation and that he was sent here for the purpose of making an investigation and that he is charged with knowledge of matter that therein appear. [306]

Mr. Merrill: That is objected to as not being competent evidence showing that this was the clipping which was inclosed in the letter. If they wanted that information why didn't they ask Mr. Darr? He could have supplied the clipping. The Court will take judicial notice that there are papers circulated in Pocatello other than the Pocatello Tribune, especially the Salt Lake Tribune which has as great a circulation as the Pocatello paper. Without proof of the fact that the clipping was sent it would not be proper to admit such evidence as this.

We object on the ground that it is incompetent, irrelevant and immaterial and prejudicial. It has not been properly identified.

The Court: There is a strong presumption that this is the article, or an article which Mr. Donnelly has read. Whether it was the article that he sent in the letter or not, there is no direct proof, but there is also a strong presumption that it was the article attached to the letter. I will reserve ruling on that for the present.

Q. You did not expect to be shown that newspaper with that article in at this time, did you?

A. I ask to see it again, please.

(Testimony of L. R. Donnelly.)

Q. Certainly. You didn't expect me to produce it at this time, did you? [307]

A. No, I didn't expect it, but——

Mr. Merrill: Objected to as incompetent, immaterial and irrelevant.

The Court: He has answered, it may stand.

A. Nothing surprises me.

Q. Nothing surprises you?

A. That's right.

Q. You are fearful of admitting here that you read that newspaper article, aren't you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and argumentative.

The Court: He may answer.

A. I am not fearful. I don't want to admit something that I didn't send in.

Q. Regardless of sending it in. You know that you never came here to Pocatello to make that complete investigation without reading these various articles that were published about it.

Mr. Merrill: We object to that as being argumentative.

The Court: He may answer.

A. Yes, I have said that I read several articles.

Q. You know that you read that article in that paper?

A. No, I don't know that I read this. I don't know whether I read this or not. [308]

Q. Did you read it carefully just now?

A. Yes, sir.

(Testimony of L. R. Donnelly.)

Q. Did you read other articles that had the same information and the same claims in them?

A. Well, I read several.

Q. Did you read other newspaper articles that contained the same thing that is in that article?

A. I read several newspapers, yes, sir.

Q. What did you mean when you told your superior that the newspapers were trying to play up this accident? Explain what was in that clipping you sent that indicated that they were trying to play up the accident.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, argumentative and not proper cross examination.

The Court: He may answer.

A. I don't remember.

Q. You don't remember that? A. No, sir.

Q. In the clipping that you sent did it contain a statement the same as the article you read here where the police claimed that this man was driving while intoxicated and that he was held on a drunken driving charge and that he was going to be arrested for manslaughter?

Mr. Merrill: Objected to as incompetent, [309] irrelevant and immaterial and not the best evidence.

The Court: I suppose the newspaper clipping which was sent by Mr. Donnelly would be in the possession of the defendants. He may answer.

A. It evidently gave an account of the accident which I didn't agree with.

(Testimony of L. R. Donnelly.)

Q. But you did know that there were claims in that article with which you didn't agree?

Mr. Merrill: Objected to as argumentative and repetition.

The Court: He may answer.

A. I mean by that, that from the investigation I made I found things that didn't agree with their article.

Q. You knew that it was claimed by the police that he was drunk while he was driving the car?

A. I didn't know that.

Mr. Merrill: We make the same objection to that question.

The Court: It has been answered and the answer may stand.

Q. You attended the trial in the District Court where Mr. Hair was tried under the indictment?

Mr. Merrill: We object to that as incompetent, irrelevant and immaterial and on the grounds that we have discussed here before. It is prejudicial and it is entirely [310] immaterial and irrelevant to any of the issues here.

The Court: That would be true if it is not connected up, but at this time I will let him answer.

A. I attended part of the trial of Mr. Hair.

Q. You attended part of the trial?

A. Yes, sir.

Q. Did you attend at the time,—strike that, please,—do you recall being in the Court room when Mr. Pugmire, the chief of police, testified. In the District Court here in Pocatello?

(Testimony of L. R. Donnelly.)

A. I think I was there.

Q. You heard Mr. Pugmire testify at that time that he took whiskey out of the Reynolds Tobacco Company truck that Mr. Hair was driving when Mr. Myers was killed?

Mr. Merrill: Objected to as not the best evidence of what Mr. Pugmire testified.

The Court: He may answer.

A. Yes, sir.

Q. You heard Mr. Pugmire testify that Mr. Hair was under the influence of intoxicating liquor and had been drinking when he struck Mr. Myers, didn't you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not the best evidence of what the testimony was. It is also prejudicial.

The Court: He may answer. [311]

A. Yes, sir.

Q. And you heard him testify that Mr. Eckersley who was in the car with Mr. Hair had been drinking?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not the best evidence.

The Court: He may answer.

A. Can I make this statement? I was there when Mr. Pugmire was on the witness stand and I don't recall now what the questions about Eckersley were and what his answers were.

Q. You didn't report to Mr. Darr any of these facts and did not report that you heard the testimony that this man drove your car or truck while

(Testimony of L. R. Donnelly.)

he was drunk and while he was drinking intoxicating liquor?

Mr. Merrill: The same objection.

The Court: He may answer.

A. I believe he did.

Q. Mr. Donnelly, my question was: you didn't report what you heard the Police state.

A. I reported to Mr. Roe, my superior.

Q. Did you report to Mr. Roe, that Mr. Pugmire, the Chief of Police, had testified that this man was under the influence of intoxicating liquor when he struck Mr. Myers?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not the best evidence. [312]

The Court: He may answer.

A. I told him what I heard at the trial.

Q. You told him what you heard them testify to?

A. Yes, sir.

Q. That Mr. Eckersley was drinking.

A. I remember——

Mr. Merrill: Just a minute. We object to that on the same grounds.

The Court: He may answer.

A. I remember telling him that Mr. Eckersley was with Mr. Hair at the time.

Q. You told them they had liquor in the truck and that the officers found it?

Mr. Merrill: We make the same objection on the same grounds as heretofore stated.

The Court: Overruled, he may answer.

A. Yes, sir.

(Testimony of L. R. Donnelly.)

Q. Do you recall when the trial was?

A. No.

Q. Would it refresh your memory if I said that it was in December, 1939?

A. Yes, that is right.

Q. After you called that to Mr. Roe's attention, Mr. Hair continued to drive the Company truck?

A. Yes, sir. [313]

Mr. Davis: That is all at this time, if the Court was going to adjourn at this time, however, I will want to continue the examination in the morning.

The Court: Yes, we will recess at this time until 10 in the morning. You will meet the Court at 10 tomorrow morning.

March 21, 1945, 10 O'clock

The Court: I will sustain the objection to the admission of the newspaper clipping with the understanding that it might be reoffered later.

Q. Now, Mr. Donnelly, again calling your attention to your letter and report. Would you like to have the deposition with you so that you may be advised if the questions are asked correctly?

A. Yes, I think so.

Q. On page 32 of the deposition I call your attention to the statement there, "I investigated the accident myself." Now, who did you talk to and who did you go to see in your investigation?

Mr. Merrill: Objected to as immaterial. We are not trying that case here. The only possible theory is that they had knowledge of this one infrac-

(Testimony of L. R. Donnelly.)

tion. That is the only possible reason that the evidence could be suggested.

The Court: Overruled. [314]

A. The parties that I called during the investigation as near as I can remember about six years ago, is that I first went to the Police Station and I got their version of the accident, and then I called on our jobbers, our dealers and his landlord and his personal acquaintances and anybody that seemed to know anything about the accident.

Q. You were trying to get any information you could from any source? A. Yes, sir.

Q. When you called on the Police and got their version; the version they gave you was that Mr. Hair was intoxicated when he killed Mr. Myers?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. I called on the physician who examined Mr. Hair shortly after the accident and he emphatically said that Mr. Hair was not intoxicated.

Q. What physician was that?

A. Dr. Hughart, I think.

Q. Did you hear Doctor Hughart testify in that case? A. Yes, sir.

Q. He was not a policeman? A. No, sir.

Q. When you got the Police version, it was that the man was [315] intoxicated when he had the accident? A. No, sir, they did not.

Q. What did they tell you?

A. They told me of the accident and what they

(Testimony of L. R. Donnelly.)

found, where the accident happened. I don't recall anybody giving his opinion as to the condition of Mr. Hair outside of the physician.

Q. Who did you talk to at the Police station?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purposes, it is repetition and doesn't tend to prove any issue in this case.

The Court: He may answer.

A. I talked to the physician mostly and to some policeman, I think it was the sergeant.

Q. Was it the desk sergeant?

A. I cannot say.

Q. Did you write his name down?

A. No, sir.

Q. Did you take any notes in making this investigation? A. Several notes, yes, sir.

Q. Whoever was the desk sergeant on April 15, 1939, that was the man you talked to?

A. Whoever was at the police station.

Q. What time of day was it?

A. I don't remember. [316]

Q. Did you talk to Mr. Pugmire, the Police Chief, that day?

Mr. Merrill: May I have my objection to this?

The Court: Yes, and I will make the same ruling. I think, Mr. Merrill, it would be better to make the objections.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

(Testimony of L. R. Donnelly.)

A. It is possible that I talked to Pugmire if he was there. I don't recall who was there.

Q. Can you tell whether you talked to the Chief of Police, Mr. Pugmire?

A. I don't remember.

Q. You don't remember?

A. No, sir, I don't remember.

Q. Now, Mr. Donnelly, I call your attention to this statement in your letter at the bottom of the page: "The police had the Company car parked on the street so everyone could look at it,—strike that—"The police had the Company car parked on the street so everyone could see it and cause public sentiment against Mr. Hair to strengthen their case." Why did you make that statement?

Mr. Merrill: Objected to as incompetent, [317] irrelevant and immaterial.

The Court: He may answer.

A. Because I believed it was true.

Q. What made you believe it was true?

A. I tried to get the car and at first I was refused; they refused to let me have it.

Q. Who refused to give it to you?

A. Whoever was at the police station.

Q. Was it this desk sergeant?

A. It must have been.

Q. Did he tell you why he refused?

A. He might, it is possible that he did but I don't remember.

Q. Now, Mr. Donnelly, I call your attention to the top of the next page: "When I got to Poca-

(Testimony of L. R. Donnelly.)

tello I tried to have the car released but they only got tough about it and . . .” Now, who was it that got tough about it?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purpose.

The Court: He may answer.

A. It was evidently the policeman at the police station.

Q. That is the desk sergeant?

A. I wouldn't say that, but whoever was there.

Q. Did you talk to more than one Policeman about it?

A. I probably could have talked to several.

Q. Isn't it a fact that they told you that the question of [318] the release was up to the Chief of Police and you would have to talk to him?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. No, sir.

Q. Your truck was filled with Company tobacco? A. That is correct.

Q. Had advertising matter of the Company?

A. Yes, sir.

Q. And bore advertising of the Company on the truck? A. Yes, sir.

Q. In your letter you stated that it was the cause of unjust advertising. A. Yes, sir.

Q. You considered that because of the advertising on the truck, advertising the Reynolds Tobacco Company?

(Testimony of L. R. Donnelly.)

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. There were more reasons.

Q. What were they?

A. There was quite a crowd there forming their opinion of the car when I went by.

Q. Did the car have printed on it, your name—that is, the [319] Reynolds Tobacco Company?

A. I don't believe so.

Q. Prince Albert Tobacco and Camel Cigarettes are products of the Reynolds Tobacco Company?

A. Yes, sir.

Q. Products they sell and advertise?

A. Yes, sir.

Q. You are familiar with the truck that Mr. Hair was driving when Mrs. Newby lost her life?

A. Yes, sir.

Q. And it had advertising on the side?

A. Yes, sir.

Q. Of Prince Albert Tobacco and Camel Cigarettes? A. That's right.

Q. That was for the purpose of advertising these products? A. Yes, sir.

Q. Mr. Hair carried advertisements of the Company and a part of his business was to advertise the products of the Reynolds Tobacco Company?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. Yes, sir.

(Testimony of L. R. Donnelly.)

Q. Do you, or did you at that time, I mean now, in 1939 work [320] on a commission for the Company?

Mr. Merrill: Now that is entirely immaterial and we object on that ground.

The Court: I think he may answer.

A. No, sir.

Q. You wanted to keep Mr. Hair on because you considered him a good salesman?

A. Not wholly.

Mr. Merrill: That is objected to as incompetent and immaterial.

The Court: He may answer.

A. Not wholly.

Q. What was the other reason or reasons?

A. I didn't believe that he was trying to violate any of the rules of the Company, however, he did violate the rules by taking his wife to the train, but it was necessary for him to have transportation, and this accident happened on the return trip. After investigating the dealers and jobbers and looking into his work, I found that he was really doing a good job.

Q. Were those the only reasons?

A. Mainly.

Q. You stated before that the jury recommended leniency?

A. That was another reason. [321]

Q. You took that into consideration?

A. Yes.

(Testimony of L. R. Donnelly.)

Q. I mean, Mr. Donnelly, you took that into consideration when you gave him another chance?

A. That's right.

Mr. Merrill: We object to that as incompetent, irrelevant and immaterial as to any issue here.

The Court: He has answered and the answer may stand.

Q. That was one of the reasons why you recommended that he be given another chance?

A. That was one of the reasons.

Q. Because the jury recommended leniency?

A. Extreme leniency.

Q. I call your attention to the fact that the case was never tried until December, 1939, and you made this recommendation in April, 1939, so that you couldn't have based it on the ground that the jury recommended leniency because Mr. Hair had not been convicted of any crime at that time.

A. No, he had not been convicted in April.

Q. So the jury had not recommended leniency?

A. Not at that time.

Q. So that was not one of the reasons that you recommended that he be given another chance?

Mr. Merrill: That is objected to as entirely immaterial.

The Court: He may answer.

A. That was one of the reasons.

Q. That was one of the reasons that you recommended that he be kept on.

A. He was never discharged.

(Testimony of L. R. Donnelly.)

Q. But the Jury had not recommended any leniency at that time? A. No.

Q. You didn't take that into consideration when you recommended it first?

A. When I first recommended it,—I didn't recommend it at that time because I didn't know.

Q. No, you didn't know. Now, you stayed in Pocatello during all of the trial of Mr. Hair in the State District Court?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I don't recall whether I was here for the entire trial.

Q. And were registered at the Bannock Hotel?

A. I think I was registered at the Whitman.

Q. Were you at Company expense when you attended that trial?

Mr. Merrill: Now that certainly is immaterial and we object on that ground.

The Court: He may answer. [323]

A. Yes, sir.

Q. You consulted with Mr. Hair's attorneys, Black and Black, at that time, during the trial?

Mr. Merrill: The same objection.

The Court: He may answer.

A. I talked to Black and Black.

Q. And was that when they talked over his defense?

Mr. Merrill: Objected to on the same grounds.

The Court: The same ruling.

(Testimony of L. R. Donnelly.)

A. Not that I recall now.

Q. You went back and forth with them and Mr. Hair to the Court house while it was being tried?

A. I did not.

Q. And were in their office many times when the case was being tried?

Mr. Merrill: I make the same objection that this is immaterial.

The Court: He may answer.

A. In whose office?

Q. Black and Black's office.

A. Yes, sir, several times making my investigation.

Q. And talking about this case?

A. Possibly, yes.

Q. And after the jury brought in their verdict did you go to [324] the District Judge concerning leniency for this man Hair?

Mr. Merrill: We object on the ground that it is immaterial.

The Court: He may answer.

A. I did not.

Q. Did you ever talk to Judge Downing about it?

Mr. Merrill: Objected to as incompetent and entirely immaterial to any issue in this case.

The Court: He may answer.

A. I don't remember.

Q. When you were here at that trial and after it was over, you reported the fact to Mr. Roe, your superior, that Mr. Hair had been convicted, didn't you?

(Testimony of L. R. Donnelly.)

Mr. Merrill: Objected to on the same grounds.

The Court: The same ruling.

A. I reported and he also made an investigation.

Q. While you were here attending that trial and talking to Black and Black and also to Hair, you know at that time, and you found out at that time that Mr. Hair had trouble in driving at Dubois, Idaho, didn't you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial to any issue, and prejudicial.

The Court: He may answer.

A. I did not. [325]

Q. Where were you when this trouble occurred at Dubois?

Mr. Merrill: We object to that as incompetent, irrelevant and immaterial. There is no evidence that there was any such occurrence.

The Court: I will sustain the objection at this time.

Q. Did you take any pictures of the right-of-way at the scene of the last accident?

A. I did not.

Q. Did you have any pictures taken there?

A. I did not.

Q. Did you make any investigation of the tracks at the scene of that accident?

A. I went out and tried to find the place but I couldn't find the place. The car had been removed.

Q. Who went with you? A. Myself.

Mr. Davis: I will ask the defendants to pro-

(Testimony of L. R. Donnelly.)

duce the newspaper clipping that was mailed to Mr. Roe. I will ask this witness.

Q. Mr. Donnelly, I will ask you to produce the newspaper clipping that was mailed by you to Mr. Roe.

Mr. Merrill: Now, that is objected to. It is apparent that no request has been made for its production [326] here. This newspaper clipping apparently is in North Carolina. The rules provide how he could have obtained it. They could have asked for it at the time of the examination of Mr. Darr. They could have asked during the last two years, or they could have asked Mr. Roe. Counsel knows that when a newspaper is mailed it is not in the possession of the one who mails it. The question is improper from any standpoint.

The Court: The witness may answer. He can tell whether he can produce it or not.

A. I am unable to produce it.

Mr. Davis: Now I ask defendants if they will produce it.

Mr. Merrill: We will be glad to do it, but it will probably take a week at least, but we will be glad to produce it.

The Court: You don't have it here?

Mr. Merrill: No, I never have seen it. The only information we have is what appears in that deposition, and that was taken in North Carolina.

The Court: Well, the matter seems to be settled for the present, if you haven't it, then, of course, you can't produce something you haven't.

(Testimony of L. R. Donnelly.)

Q. When Mr. Hair was given the truck, he was given blanks [327] upon which to make out reports in the event he had an accident?

A. That's right.

Q. Those are furnished by the Company and mailed out by the Company?

A. You say mailed out by the Company?

Q. Well, did you give them to Mr. Hair?

A. Could have been done either way.

Q. You are familiar with the two reports he made out, of the accident in which Mrs. Newby was fatally injured, either the same day or the next day?

A. Yes, sir.

Q. One was made in your presence, was it not?

A. Not in my presence.

Q. Well, you saw it? A. That's right.

Q. The instructions in one of your exhibits,—the instructions to the salesmen and to Mr. Hair, was that in the event of an accident to make those in triplicate and send one to the division manager.

A. To send all three to me.

Q. So you were familiar with one of the reports that he made out in Montpelier and which has been introduced in evidence here.

A. I am familiar with it. [328]

Q. And you were familiar with it in Montpelier at the time he made it out? A. Yes, I was.

Q. Now, Mr. Donnelly, what time during the day of April 15, 1939, was it that you went to the Police Station here? What time of the day was it that you went there?

(Testimony of L. R. Donnelly.)

Mr. Merrill: Objected to as immaterial. This has been asked and answered before and it seems he is just trying to catch this witness.

Mr. Davis: I am no such thing.

The Court: He may answer.

A. In April, 1939, that is six years ago.

Q. Sergeant Rush was on the desk from seven to three and Sergeant Thomas from three to eleven. Now, what time was it? Was it between seven and three or between three and eleven?

A. I wouldn't say.

Q. You don't know—you haven't any idea.

A. I don't have any idea.

Q. You don't know what time it was that you were there when this crowd was around this car?

A. It was several times during the day.

Q. Before noon or after noon?

A. I wouldn't say.

Q. You have no idea?

A. No, sir; I wouldn't say. [329]

Q. Was Grace, Idaho, in Mr. Hair's territory on September 11, 1942, or do you know that, Mr. Donnelly?

A. It was.

Q. And was Montpelier?

A. It was.

Q. Was Soda Springs?

A. Yes, sir.

Q. Was Pocatello?

A. It was, yes, sir.

Q. Did Mr. Hair have exclusive control and management of this truck, this panel truck?

A. No.

Q. Who else had any control of it?

(Testimony of L. R. Donnelly.)

A. I supervised the use of the truck, and the Company did.

Q. Were you supervising it when you were out of the State?

A. He has his instructions how to handle it.

Q. He had control as far as to what time he had to drive it, when he drove it and where?

A. He had his instructions how to handle the truck and he was supposed to follow the instructions.

Q. Was anybody there to see that he followed the instructions? A. No, sir.

Q. Nobody to personally supervise the use of it except Mr. Hair? A. No, sir.

Q. He could go and get the car and take it any time he pleased? A. Yes, sir. [330]

Q. He had charge of having it oiled and greased and taking care of it?

A. He did.

Q. Keeping it washed and in good condition?

A. Yes, sir.

Q. What was his instructions as to keeping it clean and in good condition so that it would be good advertising for the company?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. He was told to keep it in good shape, not for advertising, but so the car was in good condition.

Q. What about keeping it clean and washed?

(Testimony of L. R. Donnelly.)

A. He was instructed not to have the car washed over once a month.

Q. You instructed him on that?

A. Yes, sir.

Q. Did he carry tobacco and other company products in the truck? A. Yes, sir.

Q. And advertising matter, he carried that in it also? A. Yes, sir.

Q. You stated a minute ago that one of the reasons that you [331] recommended that Mr. Hair be continued on his job was that he was taking his wife to the depot and returning from that trip he had this accident?

A. He said he violated the rule, but that was his reason for using the car.

Q. But you found out that he had Mr. Eckersley with him and that he hadn't come from the depot, but from the El Rio night club.

A. I did not.

Q. Didn't you make inquiry as to where he was coming from? A. I talked to them.

Q. And they told you Mr. Eckersley was with him?

A. Yes, they informed me that the man was with him.

Q. And you tried to conceal that from your superior?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

The Court: He may answer.

(Testimony of L. R. Donnelly.)

A. I didn't think it was necessary.

Q. You didn't think it was necessary to tell your superior?
A. No, sir.

Q. When Mr. Darr consented that this man be kept you never had told him that Mr. Eckersley was with him in the car, had you, Mr. Donnelly?

A. I have told my superior officer.

Q. You told Mr. Roe that Mr. Eckersley was in the car? [332]

A. That is who I was to report to.

Q. You didn't tell him in the written report?

A. I didn't know it then.

Q. Do you go over your territory,—your salesmen's territory?
A. Yes, sir.

Q. Frequently?

A. As frequently as I could.

Q. How often during 1939, 1940 and 1941 did you come to Mr. Hair's territory?

A. About once a month.

Q. Did you go over the territory?

A. Whenever he happened to be so I could.

Q. Where did you go?

A. Wherever he happened to be.

Q. Would you see him at different places in the territory?

A. Mostly in Pocatello, his headquarters.

Q. Did you ever see him at Pond's?

A. I don't recall where Pond's is.

Q. It is a resort between Ashton and West Yellowstone.

A. It is possible that I saw him there.

(Testimony of L. R. Donnelly.)

Q. Was his wife with him then?

A. I don't think he had his wife with him.

Q. Did you have your wife with you?

A. On a vacation. [333]

Q. Did Mr. Hair have his wife?

A. Yes, sir.

Q. In the company truck? A. No, sir.

Q. Did you ever see Mr. Hair there with the company truck? A. No, sir.

Q. Did you ever see him at any resort around Ashton with the truck? A. No, sir.

Q. You and your wife and Mr. Hair and his wife spent your vacation at Ponds?

A. Yes, that's right.

Q. Were you at his home in Pocatello at any time? A. Yes, I have been there.

Q. Did you ever have any meals there?

A. I have had meals there, yes.

Q. After this Myers accident you took Mr. Hair to the hotel where you and Mr. Roe and Mrs. Hair were all there together? A. Yes, sir.

Q. You made it clear to Mr. Hair at that time that if he ever hauled his wife or anyone else in that truck that he would be immediately discharged?

A. That's right.

Q. Mrs. Hair wanted to help him? [334]

A. That's right.

Q. Mrs. Hair knew that if she ever rode in that truck again he would be discharged?

A. Yes, sir.

Q. You knew that Mr. Hair used his truck to call

(Testimony of L. R. Donnelly.)

on people who handled your products and who operated night clubs and taverns and places of that kind?

A. Yes, sir.

Q. You knew that it was necessary to call on these people at night sometimes?

A. No, sir.

Q. Were his instructions given as to the time he was to use the truck? A. Yes, sir.

Q. And what were his instructions as to the time he was to use the company truck?

A. He was to have the truck in the garage at sundown.

Q. He could use it at 4:15, 4:30 and 5 o'clock in the daytime? A. On company business.

Q. Now, Mr. Donnelly, you recall seeing Mr. Newby and his brother-in-law after this accident?

A. Yes, sir.

Q. Is it a fact that you were concerned about what kind of a doctor they had. Whether they had a good doctor?

Mr. Merrill: Objected to as not proper cross-[335] examination. It would be all right after we put him on as our witness.

The Court: I think he can cross examine him on this. He may answer.

A. I was concerned with whether they had a doctor.

Q. Were you going to get another doctor if you thought the one they had wasn't giving proper treatment? A. No, sir.

(Testimony of L. R. Donnelly.)

Q. What remark did you make about a passenger in Mr. Hair's car, at that time? What did you say?

A. I made the remark,—I asked Hair, "my God did you have a passenger?"

Q. Didn't you say: "My God did you have another passenger?"

A. Not at that time.

Q. Didn't you testify before that you said "My God did you have another passenger?"

A. I testified "My God did you have a passenger," and "Another passenger" later on.

Q. You testified that you said "My God did you have another passenger?"

A. Yes, sir.

Q. Were you the owner of the truck that Mr. Hair was driving at the time of this last accident?

A. No.

Q. You permitted Mr. Hair to sign your name in the application [336] for license and to name you as the owner?

A. It was a matter of convenience; the cars were all in my name.

Q. You permitted Mr. Hair to sign your name to the application and represent you as the owner of the truck?

Mr. Merrill: Objected to as immaterial for any purpose.

The Court: He may answer.

A. Yes, sir.

Q. You knew that it wasn't your car when you permitted that?

Mr. Merrill: Objected to as immaterial.

(Testimony of L. R. Donnelly.)

The Court: He may answer.

A. It wasn't my car.

Q. One of the reasons was that you wanted it to appear as your car and then in case of an accident you could say that it wasn't your car, but the company car?

Mr. Merrill: Objected to as immaterial and irrelevant for any purpose.

The Court: He may answer.

A. No.

Mr. Davis I think that is all at this time.

Redirect Examination

By Mr. Smith:

Q. Mr. Donnelly, in reference to the title to the automobile, as to it being in your name, explain the reason for that. [337]

A. Well, it is for convenience sake in the matter of obtaining the license in obtaining license for a good many cars, it cannot be taken care of in Winston-Salem, North Carolina. It is a good deal more convenient.

Q. Is that true over the district over which you have charge?

A. Yes, sir, it was true in my district.

Q. State whether or not that was true of every automobile driven by every salesman in your territory?

A. Yes, it was.

Q Now, Mr. Donnelly at the time of the trial

(Testimony of L. R. Donnelly.)

with reference to the Myers incident in Pocatello, you heard some of the witnesses testify?

A. Yes, sir, I heard several witnesses testify.

Q. You recall that you were asked whether you heard one Pugmire testify? A. Yes, sir.

Q. Now, with reference to the question asked you as to whether or not you heard the witness Pugmire testify that liquor was found in Hair's car. Did you hear anyone testify at that time in explanation of that fact? A. Yes, sir.

Q. If so state the facts.

A. I heard several witnesses testify at the trial. I heard the doctor testify, I remember that, and I think Mr. Pugmire [338] testified and I think Mr. Eckersley testified.

Q. What did Mr. Eckersley say with reference to the liquor found in the car?

A. Mr. Eckersley said that there was a bottle of liquor that was found in the car, and that it belonged to him

Q. Now Mr. Donnelly, when did you go to Montpelier with reference to the Newby accident?

A. It was on the 12th of September.

Q. I beg your pardon?

A. It was on the 12th of September.

Q. State what you did when you got there?

A. First of all I went to the Burgoyne cabins where Mr. Hair was staying and got his version of the accident, then I drove my car to the Ford Garage where the wrecked car was, and from the garage after looking over the wrecked car, I went to the

(Testimony of L. R. Donnelly.)

police station. At the police station I was informed that the sheriff who made the investigation was not there and that the police captain, or the chief of police who was there didn't know anything about the accident; then I went back to the garage and made a more thorough inspection of the car and transferred the tobacco from the wrecked car into the car I had with me. Then I went up to the cabin camp and made arrangement to stay that evening.

Q. That was Saturday evening?

A. Yes, sir. [339]

Q. Up to that time had Mr. Hair handed in any report in connection with or relative to the accident?

A. I inquired if he had made out an accident report and he said he had and mailed it in.

Q. Did he hand you a report at that time or had it been sent? A. He had mailed it in.

Q. Was the second report made at that time while you were there at Montpelier, or had that been made and sent in?

A. No, it was made after I found out there was a passenger in the car, and that the first report was not a correct report.

Q. What was the extent of your examination of the damaged automobile which Mr. Hair had been driving?

A. I found that the body was badly damaged I would say almost total damage to the body; the right front tire had been blown out, in fact there wasn't much left but to salvage it.

Q. Where do you live Mr. Donnelly?

(Testimony of L. R. Donnelly.)

A. Now?

Q. Yes. A. Salt Lake City, Utah.

Q. Was that your home in April, 1939?

A. Yes, sir.

Q. How long had you lived there before that time?

A. I had lived in Salt Lake City for seven years.

Q. Did you ever live in Pocatello?

A. No, sir.

Q. What paper do you generally take at your home,—what newspaper do you take?

A. The Salt Lake Tribune and the Salt Lake Telegram.

Q. With reference to the newspaper item which you have been questioned about by Mr. Davis, do you have any distinct recollection at this time what paper or clipping you sent to the Reynolds Tobacco Company?

Q. I don't have any recollection of what clipping it was that I sent in, no sir.

Q. Or from what paper it was?

A. No, sir.

Q. Whether it was a Salt Lake paper or what?

A. I rather imagine it would be the Tribune.

Q. Which Tribune?

A. The morning Tribune here in Pocatello.

Q. Which Tribune?

A. The Salt Lake Tribune.

Q. But you have no independent recollection which paper it might have been at this time?

A. I wouldn't have any recollection other than that was what I was in the habit of buying.

(Testimony of L. R. Donnelly.)

Q. When was this conference that you testified about on cross- [341] examination which you had with Mr. Hair at which time you continued him in the company's employ. I am speaking now of the time after the Myers incident.

A. The conference took place at the Whitman hotel?

Q. With reference to April 16, 1939, how long a time after that was it, approximately?

A. Well, it was after I had completed my investigation, and after Mr. Roe had arrived here in Pocatello. I don't know what date it was.

Q. It was a relatively short time after the Myers incident?

A. Yes, a short time after.

Q. At that time had you had the interview with the doctor which you testified concerning,—the interview as to whether or not Hair was intoxicated on April 16, 1939?

A. It was, yes, sir.

Q. Now, going back to the report which you sent back to the company. The information you obtained from the doctor relative to Hair's condition, did that have any influence on some of the statements you made in the report to the company?

A. Yes, sir.

Q. Did you believe the doctor, or someone who indicated to you—the police officers who indicated to you that Hair had been intoxicated? [342]

A. I believed the doctor who made the investigation and examination.

(Testimony of L. R. Donnelly.)

Q. Have you any specific authority to hire or do away with the service of a salesman?

A. I have authority to discharge salesmen, but no authority to hire salesmen.

Q. At this conference which was at the Witman Hotel shortly after the Myers incident I tink you stated that yourself, Mr. Roe, Mrs. Hair and Mr. Hair were present.

A. That's right.

Q. What position does Mr. Roe occupy with reference to the company?

A. Department manager.

Q. Where is his headquarters?

A. At that time in Denver, Colorado.

Q. What transpired at that conference with specific reference to Mr. Hair continuing with the company and what he would have to do and observe if he continued with the company?

A. Mr. Roe and myself sat Mr. Hair and his wife down in the lobby of the second floor of the Whitman Hotel and we read the instructions to him and asked if he understood each instruction and he said that he did and we asked him if he ever intended to carry any more passengers in the car and he flatly said he would never carry another passenger, including his wife. We made it clear that any more infractions of the company rules and he would be immediately discharged. We asked him if he understood that and he said that he did. We asked his wife, also, and she said she did. We also went into

(Testimony of L. R. Donnelly.)

the company rules on how to maintain and operate the car and we made sure that he understood each rule. He flatly said he would never carry any passengers or violate any company rule of any kind.

Q. State whether or not any of the company rules relative to carrying passengers were ever violated by Mr. Hair from April, 1939, until September 11, 1942? A. Not to my knowledge.

The Court: We will take a recess for ten minutes.

11:05 A. M., March 21, 1945.

Q. A few minutes ago you were interrogated by Mr. Davis concerning a time you were at a resort at Pond's at which time Mr. Hair and his wife were there. Was there anyone else there at that time, any employee of the Reynolds Tobacco Company?

A. Yes, sir.

Q. Who?

A. There was another salesman by the name of Hamer there at that time.

Q. What time of the year was that? [344]

A. That was in July, during our vacation.

Q. Do you know what year that was?

A. I don't recall.

Q. Was it after the Myers incident or before?

A. It could have been either.

Q. Whose car did Hair have at that time?

A. His passenger car.

Q. Relate or give the reasons, or relate the circumstances of how it came to your attention that he was driving his own car.

(Testimony of L. R. Donnelly.)

A. We made arrangements to spend our vacations together. This other salesman, Mr. Hamer, located at Salt Lake City, and his wife, myself and my wife and my youngster and Mr. Hair and his wife. I drove my personal car from Salt Lake City to Pocatello with my wife, Mr. Hamer and his wife and my youngster. We met Mr. Hair there and we drove from Pocatello to Pond's Lodge, Mr. Hair drove his personal car and I drove my personal car. We spent some time at Pond's, did a little fishing and then drove to Yellowstone Park.

Q. For how long a period were you together?

A. We generally have nine or ten days' vacation.

Q. You had an opportunity to observe the car that Hair was driving? A. Yes, sir.

Q. Was there any other occasion when you were on a vacation [345] and Hair was on a vacation when you and Hair were together?

A. Not that I remember.

Q. That was the only time?

A. Yes, sir.

Mr. Smith: That will be all at this time, however we will want to recall Mr. Donnelly as our own witness.

Recross Examination

By Mr. Davis:

Q. Now, Mr. Donnelly, you had a talk with Hair, —you and Mr. Roe,—in which you went all over the company instructions and told Hair it was against the rules to haul guests. A. That's right.

(Testimony of L. R. Donnelly.)

Q. And you went all over them with him when you delivered the car to him in 1937?

A. He signed the agreement.

Q. Yes, and he had already signed one agreement not to haul any guests? A. Yes, sir.

Q. You knew that he violated that?

A. That's right.

Q. He signed a statement, one of your exhibits, that he understood all those rules in 1937?

A. Yes, he signed one. [346]

Q. And having violated them once, you didn't think he would violate them again?

A. I didn't think he would violate them again.

Q. Mr. Eckersley claimed the bottle of whiskey that was in your truck in April, 1939, was his whiskey? A. That's right.

Q. And you believed that?

A. I believed it.

Q. Did Mr. Hair have any right to allow Eckersley to haul whiskey in your truck?

A. Not at all.

Q. You say you buy the Salt Lake Tribune?

A. Yes, sir.

Q. Do you buy it each day or take it at home?

A. I take it at home and buy it.

Q. You stated in answer to counsel's question that you buy the Pocatello Tribune when you went to Pocatello?

Mr. Smith: That is objected to that is not the witnesses' testimony.

(Testimony of L. R. Donnelly.)

Mr. Davis: Then I am mistaken, I will withdraw the question.

Q. Did you buy the Pocatello Tribune in Pocatello? A. I try to buy the home paper.

Q. Did you buy the Pocatello paper when you were investigating this Myers accident? [347]

A. I might have. I don't remember.

Q. You wouldn't come to Pocatello and investigate a Pocatello accident and buy a Salt Lake City paper would you?

A. If it had an article in it I would.

Q. Did you buy the local paper Mr. Donnelly?

A. I don't remember.

Q. What did you mean when you told Mr. Roe that you were sending a clipping from the local paper? A. That I bought it locally.

Q. You bought it in Salt Lake City, did you.

A. I bought it in Pocatello.

Q. And which paper was it you bought?

A. I don't remember.

Q. Did you read the local paper, the Pocatello paper about the Myers accident?

A. I read whatever paper had the article in that I was reading.

Q. You know that you wanted to look into the matter and find out what was claimed, and you know that you read the Pocatello paper do you not?

A. Not after six years, I don't remember.

Q. Would you say that you didn't read the local paper? A. I don't remember.

(Testimony of L. R. Donnelly.)

Q. Don't you think in making your investigation that you would have read all the papers you could get that had articles about it? [348]

Mr. Merrill: That is objected to as repetition.

The Court: Yes, it may be, but I think he may answer.

A. I read several papers and I also made an investigation of my own which satisfied me of the condition of the accident.

Q. You read several papers in Pocatello. What papers could you get besides the Pocatello Tribune and the Salt Lake Tribune?

A. You could get any paper in the United States if you wanted to go after it.

Q. Do you think that they would have an account of the Myers accident in them?

A. I guess several would.

Q. Other papers throughout the United States?

A. I wouldn't know.

Q. When you got to Montpelier, you found that the first report that Mr. Hair made wasn't correct?

A. That's right.

Q. You suggested that he send in a corrected report?

A. I insisted that he send in a correct report.

Mr. Davis: That's all.

Mr. Smith: That's all.

R. M. PUGMIRE,

called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows: [349]

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. R. M. Pugmire.

Q. Where do you live?

A. Pocatello, Idaho.

Q. How long have you lived in Pocatello?

A. About forty years.

Q. What is your occupation?

A. Police officer.

Q. How long have you been a police officer?

A. About twenty-five years.

Q. Who are you at the present time employed by?

A. The city of Pocatello.

Q. How long have you been in the employ of the City of Pocatello, Mr. Pugmire?

A. Twenty-three years.

Q. What is your present position?

A. Chief of detectives.

Q. Have you ever held any other or superior position in the City of Pocatello?

A. I was Chief of Police.

Q. At what time were you Chief of Police of the City of Pocatello.

A. From 1936 until 1941. [350]

Q. You were Chief of Police on April 15, 1939?

A. Yes, sir.

(Testimony of R. M. Pugmire.)

Q. Do you remember what has been referred to here as the Myers accident? A. Yes, sir.

Q. Do you know Mr. Hair, who is in the Court room here? A. Yes, sir.

Q. Do you know Mr. Donnelly here (indicating)? A. Yes, sir.

Q. When did you first see Mr. Donnelly, if you remember?

A. I think it was a day or two after the Myers accident.

Q. Where did you see him?

A. At the Police Station.

Q. Did you have a conversation with him at that time? A. Yes, sir.

Q. That was at the Police Station in Pocatello?

A. Yes, sir.

Q. What did Mr. Donnelly say when he came to the Police Station?

Mr. Merrill: That is objected to as incompetent, irrelevant and immaterial for any purpose.

The Court: He may answer.

A. He wanted to know the circumstances of the accident and he wanted to know about the automobile we were holding.

Q. What did you tell him about the circumstances of the accident, at that time? [351]

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purpose.

The Court: He may answer.

A. I am not sure that I can give you the conversation in detail, but I discussed quite thoroughly the circumstances of the case.

(Testimony of R. M. Pugmire.)

Q. What were the circumstances generally that you related?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. We are not trying the Myers case at this time. We are trying another matter entirely.

Mr. Davis: But we are trying the question of any notice that Mr. Donnelly or the Reynolds Tobacco Company might have had concerning Mr. Hair hauling guests in this car.

Mr. Merrill: But they have brought that out.

The Court: He may answer.

A. I advised Mr. Donnelly about the accident. The time and the place, the driver of the automobile and the passenger in the car and what we intended to do with the automobile.

Q. Anything else?

A. Yes, and what our intention was in respect to the driver.

Q. Did you advise him with reference to anything found in the truck and the condition of the driver and the passenger in the truck?

Mr. Merrill: Objected to as incompetent, [352] irrelevant and immaterial.

The Court: He may answer.

A. Yes, sir.

Q. What did you advise him?

Mr. Merrill: Now, we make the same objection to this question.

The Court: He may answer.

(Testimony of R. M. Pugmire.)

A. I advised Mr. Donnelly that Mr. Hair was under the influence of intoxicating liquor.

Mr. Merrill: I move to strike that, no foundation has been laid for it and it is incompetent, irrelevant and immaterial.

The Court: Possibly the foundation is not sufficiently laid, but it seems to me that he told the place and time and who was there, but perhaps you better clear that up.

Q. I think you stated that this was a day or two after the man Myers lost his life?

A. Yes, sir.

Q. Where was the conversation had?

A. At the Police station.

Q. And who was present?

A. Mr. Donnelly, myself and the Desk Sergeant.

Q. Do you remember who the desk sergeant was at that time? A. No, I don't remember. [353]

Q. Was it in the daytime—just fix the time as near as you can, Mr. Pugmire.

A. As I recall it was during the forenoon. I say that for the reason that we had just completed the photographing of the automobile which set in front of the police station, and we photographed it at that time because the sun condition was favorable and so I think it would be before noon of the day I talked to him.

Q. At that time what did you advise him as to the condition of the driver and the passenger and as to what you had found in the car?

Mr. Merrill: We object again that it is incom-

(Testimony of R. M. Pugmire.)

petent, irrelevant and immaterial and no proper foundation has been laid, and if it is asking an impeaching question it is not proper in form.

The Court: He may answer.

A. I am quite certain that I advised Mr. Donnelly that Mr. Hair was placed under arrest because of his condition; that he had been charged with operating an automobile while intoxicated, and that we had taken from the automobile several articles that we were holding as evidence, among them was a partially filled bottle of whiskey.

Q. Did you make any statement with reference to Eckersley at that time? A. I did. [354]

Q. What was that?

A. I told him that he had another young man in the automobile who was also intoxicated and that he had been charged with intoxication.

Q. At that conversation, Mr. Pugmire, was there anything said concerning the city being sued, or that you, as a police officer, were endeavoring to be tough or hard boiled?

Mr. Merrill: That is objected to as incompetent, irrelevant and immaterial and no proper foundation has been laid for such examination.

The Court: The objection is sustained.

Q. What else did Mr. Donnelly say to you. Did he make any demand or say what he would do to the City?

Mr. Merrill: That is objected to as being entirely incompetent, irrelevant and immaterial for any purpose.

(Testimony of R. M. Pugmire.)

The Court: I think all the conversation would be admissible, and he may give the conversation.

A. As I recall Mr. Donnelly's conduct there was very much of a gentleman. I don't recall any demand or request, except there was, I think, a request made to release the automobile, that he might take care of the property in it, and that he wanted to take the automobile and have it repaired.

Q. You were in Pocatello, as Chief of Police during 1939, 1940 and 1941? [355]

A. A part of 1941.

Q. You were here in 1939, 1940?

A. Yes, sir.

Q. And a part of 1941? A. Yes, sir.

Q. Where did you go in 1941?

A. With the F. B. I.

Q. How long were you with the F. B. I.?

Mr. Merrill: I don't see the materiality of this and will object on that ground.

The Court: He may answer.

A. About two and a half years.

Q. During that time where were you stationed?

A. I was stationed in several places.

Q. Were you at any time out of Pocatello?

A. Yes, sir; part of that time.

Q. Now, I will ask you,—strike that,—let me ask you if a part of the two and a half years with the F. B. I. was in Pocatello?

A. Yes, sir; I was stationed here part of that time.

Q. Now, Mr. Pugmire, I will ask you, did you

(Testimony of R. M. Pugmire.)

know the general reputation of Rulon D. Hair in the community in which he lived during 1939, 1940 and 1941 for being a drunken, reckless driver or a sober, careful driver? [356]

Mr. Merrill: That is objected to as being incompetent, irrelevant and immaterial and not having a proper foundation laid. He is not charged with being a drunken driver, there is no reference in the complaint to any such thing. The question is incompetent and not proper in this case and there is no foundation to permit the asking of it.

The Court: He may answer, yes or no, as to whether he knows.

A. Yes, sir.

Q. What is that reputation?

Mr. Merrill: Now, we make the same objection. There is no proper foundation laid for any such question and it does not deal with any issue in this case and it is prejudicial.

The Court: I think I will excuse the jury and hear you on this question.

(Whereupon, the jury was excused and counsel presented the matter to the Court.)

1:30 P. M., March 21, 1945

The Court: I think from my hurried examination of this matter that the objection should be sustained at the present time. I think the question, if asked, should follow the allegations of the complaint. [357]

Mr. Davis: Then I ask, Your Honor, that I be given permission, under the rules, to allege that they knew that Hair was a drunken, incompetent driver.

Mr. Merrill: And we certainly object to the amendment at this time. If it is allowed we will ask for a continuance to meet that. This has been through the Courts twice now and through the Circuit Court of Appeals once. We shall urge this objection.

The Court: The Court's thought was that in view of the fact that the complaint alleged that he was reckless and incompetent, that the question should be whether they knew his reputation as a reckless, incompetent driver. I cannot see where there could be any element of surprise to the defendants in amending the complaint to include this word 'drunken.' Certainly they should be able to meet this issue if they are prepared to meet the allegations now in the complaint, the allegation that he was reckless and incompetent. I am very doubtful that the amendment either strengthens or adds to the complaint.

Just how would you want to amend that, Mr. Davis?

Mr. Davis: We want to amend Paragraph seven to read: "That at all times herein mentioned defendant Rulon D. Hair had permission and authority from said Reynolds Tobacco Company and L. R. Donnelly to use [358] and operate said Chevrolet Panel truck upon the public Highways of the State of Idaho, notwithstanding that at all times

the said Reynolds Tobacco Company and Donnelly knew that said Hair was a careless, reckless, drunken driver of an automobile, and was in the habit of hauling guests in violation of instructions.”

Mr. Merrill: Our objection goes to the proposal as stated by counsel.

The Court: I think we will recess at this time for fifteen minutes. I want to look into this matter a little further.

2:20 P.M., March 21, 1945

The Court: Subdivision of Rule 15 of the rules of Civil Procedure provides in part: “If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence.”

In this case I cannot see, where the charge is already made that he was a reckless, incompetent driver,—I [359] cannot see where the defendants would be taken by surprise or injured in any way by the amendment. The amendment will be permitted and we will proceed.

The Court: The Bailiff will call the jury.

(Testimony of R. M. Pugmire.)

Mr. Merrill: May we have an exception to the ruling?

The Court: You may have your exception. I will say, too, that if counsel later wants to make another showing on this matter, I will hear you.

(Mr. Pugmire returned to the witness stand.)

Mr. Merrill: I want to add to the objection that this is not the proper method of trying to prove or of proving the allegation of the complaint.

The Court: I think he may answer the question. Do you remember the question, Mr. Witness?

A. Yes, I do. His reputation was that of a reckless——

The Court: He may say whether the reputation was good or bad as to the matters inquired about.

Q. Do you know his general reputation in the community in which he lived for being a drunken, reckless driver of automobiles or a careful, sober driver?

Mr. Davis: Now, I take it he is entitled to say whether it was one or the other.

The Court: If his reputation is bad it would [360] be that he is a reckless, careless and so on, driver, and if it was good then he would understand that he was a careful, sober driver, as I understand the question now.

Mr. Davis: If that is the understanding. I only want it clear that it is understood if he answers

(Testimony of R. M. Pugmire.)

that it is bad, that he is answering that he had such a reputation.

The Court: It may be so understood.

A. It was bad.

Mr. Davis: That is all.

Cross-Examination

By Mr. Merrill:

Q. When did you first become acquainted with Mr. Hair?

A. I have never been personally acquainted with him. I first knew Mr. Hair to say who he was, I would say probably in the fore part of 1939.

Q. That was when the Myers incident happened?

A. I would say some time prior to that, and about that time, yes, sir.

Q. Now, Mr. Pugmire, you say that Mr. Donnelly came to see you and that he was a perfect gentleman?

A. Yes, sir.

Q. He simply wanted information?

A. That is right.

Q. He discussed the matter calmly with you?

A. Yes, sir.

Q. There was no antagonism?

A. Not bad.

Q. You gave him the information?

A. Yes, sir.

Q. Do you know the name of the Doctor that examined Hair?

A. No, sir.

Q. Do you know that it was Doctor Hughart?

A. No, sir, I don't.

Q. You knew that a Doctor did examine him?

A. I understood that at the trial.

(Testimony of R. M. Pugmire.)

Q. Do you know who examined him?

A. No, sir, I don't.

Q. Did you call a Doctor?

A. I may have done.

Q. But you don't remember whether you did or not?

A. I wouldn't swear to it.

Q. If the Doctor testified, or found that Hair was not intoxicated, you would take his word for it?

Mr. Davis: Now, we will object to that as calling for a conclusion of this witness.

The Court: He may answer.

A. I think I should be guided by my own judgment.

Q. You saw Mr. Hair at that time for the first time?

A. I think I had seen him prior to that.

Q. Under what circumstances? [362]

A. When he was about his business.

Q. Driving an automobile as an ordinary man would drive it.

A. Yes, sir; about his trade.

Q. Doing business in the usual and ordinary way of a usual and ordinary man?

A. Yes, sir.

Q. Aside from the contact with him in the Myers incident, did you have other contacts with him?

A. Not with him.

Q. You never saw him other than that?

A. Oh, yes, on several occasions.

Q. He was going about his business as an ordinary man?

(Testimony of R. M. Pugmire.)

A. Yes, sir, except on two occasions he wasn't.

Q. When was that and what was that occasion?

A. In the latter part of '43—no, it was the latter part of '42.

Mr. Merrill: I move that be stricken as it is after the happening of the event here.

The Court: Yes, it may be stricken, but it was in answer to your question.

Q. Mr. Pugmire, your answer touching his reputation is based upon the Myers incident?

A. Not entirely.

Q. It is the principal thing? [363]

A. I would think so.

Q. That is the only thing wrong with his driving of an automobile in this locality?

A. No, sir.

Q. What else?

A. I heard considerable talk about Mr. Hair up at Dubois, Idaho, while I was with the F. B. I.

Q. You heard of a Dubois incident and the Myers incident?

A. It was spread over a period of time.

Q. The Dubois incident and the Myers incident? A. And the one at Montpelier.

Q. The one at Montpelier is the one we are trying here. A. That's right.

Q. The Dubois incident and the Myers incident happened about the same time in the early part of 1939? A. I think that's right.

Q. You never heard anything about his driving an automobile on any other occasion?

A. I don't understand your question.

(Testimony of R. M. Pugmire.)

Q. You have not heard anything bad about his driving automobiles on any other than those three occasions? A. That's right.

Q. You are basing your reputation,—strike that,—you are basing your conclusion that his reputation was bad on those three incidents?

A. No, sir. [364]

Q. Have you heard anything else?

A. I have heard the comment of other officers.

Q. All the information is from officers?

A. That is right.

Q. You don't have the information from the general public? A. No, sir.

Q. You never heard anything from the general public touching the fact that Hair was a drunken, incompetent and reckless driver?

A. Not that I recall.

Q. You have no information from the public at large that would lead you to testify as you have this afternoon? A. That's right.

Q. You never advised anyone that you had such information? A. No, sir.

Q. You never commented on it?

A. Yes, I have commented on it.

Q. Just at the time of the trial? A. No.

Q. And to Mr. Davis?

A. I have commented.

Q. But the fact is that you base your knowledge or your statement upon these three incidents, the one at Montpelier, the Myers incident and the so called Dubois incident? [365]

(Testimony of R. M. Pugmire.)

A. That is not a fact.

Q. You say they are not the facts?

A. They are not the facts.

Q. Then, Mr. Pugmire, what are the facts?

A. I have heard him discussed by many officers.

Q. What have you heard as to his incompetent driving?

A. None that I recall specifically.

Q. Then you must base it on those three instances?

A. And conversation I have had with other officers.

Q. Just rumor? A. Possibly.

Q. You have no knowledge and no information from anybody other than what officers could have said?

A. I think that is right.

Q. Mr. Pugmire, are you a member of the National Safety Council? A. Yes, sir.

Q. Do you know that they give awards for careful driving? A. Yes, sir.

Q. Members of your Police Department go to the conventions of the National Safety Council?

A. I think the Chief of Police attended that convention.

Q. You say that you know the Safety Council gives awards for careful driving?

A. Yes, sir.

Q. Do you know what requirements are necessary before a man will be awarded such an award?

A. I am not familiar with all the details of it.

Q. He must be a careful and competent driver?

(Testimony of R. M. Pugmire.)

A. Yes, sir.

Q. Or he is not awarded?

A. It is based on reports.

Q. Reports on the man? A. Yes, sir.

Q. State associations send reports to the National Association or the National Council?

A. The Police Departments may be members of the National Safety Council, but I don't know of any Department outside of Boise who are such members of the National Safety Council. Whether the City of Boise Police Department has ever sent in reports, I don't know.

Q. You know generally the theory of the National Safety Council, what it does, generally?

A. Yes, sir.

Q. What does it do with reference to drivers? What is the theory of the Council?

Mr. Davis: Objected to unless there is some purpose that I don't understand. It is incompetent, irrelevant and immaterial.

The Court: The objection is sustained at this time, I don't see its competency.

Q. You know that the National Council gives awards only to men [367] who are competent drivers and who are so reported?

A. Yes, sir, so reported but not proven.

Q. It is an honor conferred upon an individual because of reports that the National Council gets.

A. Yes, sir.

Mr. Merrill: That is all.

(Testimony of R. M. Pugmire.)

Redirect Examination

By Mr. Davis:

Q. Rumors and hearsay came to you concerning Mr. Hair's driving, now, are those the things you based your opinion on? A. That's right.

Q. Then you based it on other matters that came to you outside of these accidents, is that correct?

A. That is correct.

Q. Did you get numerous reports from Police Officers concerning this man's activities that caused you to form your opinion that he had such a reputation?

Mr. Merrill: Objected to as leading and incompetent, Mr. Davis has used language that is not proper in asking a question of that sort.

The Court: Possibly it is leading but otherwise it is competent. I will sustain the objection on the ground that it is leading.

Q. Tell us the other matters that came to your attention that caused you to form your opinion which you have expressed here. [368]

Mr. Merrill: We object to this unless it is restricted to improper driving.

Mr. Davis: Certainly it is restricted to that question.

The Court: As to his general reputation in this regard.

A. In addition to hearing at various times Mr. Hair discussed with respect to the three accidents

(Testimony of R. M. Pugmire.)

mentioned, I have heard officers speak of Mr. Hair and his driving and his continuing to drive after it had been shown that he was that kind of driver.

Mr. Merrill: Objected to as incompetent for any purpose and move to strike the answer.

The Court: It may be stricken.

Q. In answering that you said "continue to drive", drive in what condition

Mr. Merrill: We object as incompetent, irrelevant and immaterial, and it is repetition and the answer was stricken.

The Court: He may answer.

A. As a careless and reckless driver.

Q. You mentioned two occasions that you saw him, but I don't think that you completed your answer. Were those occasions at a time when he was driving the Reynolds Tobacco Company [369] truck? A. He was.

Q. Was what you saw on those occasions in addition to those other things that caused you to form your opinion that he was a reckless and incompetent driver?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained. It is not a question of his opinion.

Q. What you saw at that time, did you take that into consideration in forming your opinion as to what his general reputation was?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

(Testimony of R. M. Pugmire.)

The Court: I think he has answered the question. It is a question of what he has heard, I don't think he should be permitted to testify as to his own personal opinion.

Mr. Davis: That is all.

Mr. Merrill: That is all. At this time we move to strike the testimony of Mr. Pugmire and all of it touching the general reputation of Mr. Hair as a drunken, reckless, careless, negligent or incompetent driver upon the ground and for the reason that it is based merely upon rumor and upon three incidents only, and [370] which incidents in and of themselves would be utterly impossible to connect up in any way in this case. One of these instances being the case which is being tried here, and upon the further ground that the witness does not purport to give the general reputation. He was very specific in saying that the only thing he ever heard was from the police or officers and not the general public.

The Court: I think he also testifies as to rumors and I understand that general reputation is more from rumors than anything else.

Mr. Merrill: But rumors are not sufficient to take into consideration in passing upon, or basing an opinion as to general reputation or in forming an opinion as to reputation.

The Court: But rumors can be taken into consideration along with other matters. I will reserve my ruling on this question.

Mr. Merrill: May I have this further objection touching the motion to strike, or rather the further ground for the motion; that there is no proof of any kind or character that any of the matters or things testified to by him came to the knowledge of the defendants or either of them.

The Court: Yes, you may make that addition.

SID CLOSE

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Sid Close.

Q. Where do you live? A. Dubois.

Q. That is in Clark County, Idaho?

A. Yes, sir.

Q. What is your business? A. Sheriff.

Q. How long have you been Sheriff of Clark County, Idaho? A. Six years.

Q. Do you know Rulon D. Hair?

A. Yes, sir.

Q. How long have you known him?

A. I think the first day, or the first time I saw him was back in either 1937 or 1938.

Q. Did you have occasion to observe him or to watch him in your locality? A. Yes, sir.

(Testimony of Sid Close.)

Q. Taking the year 1939, Mr. Close, did you see him in Clark County that year? A. Yes, sir.

Q. What kind of conveyance was he driving?

A. A panel truck.

Q. Do you recall anything on the truck?

A. Yes, sir, advertising of Reynolds Tobacco Company.

Q. Did you see him in 1940 in your county?

A. Yes, sir.

Q. And in 1941, did you see him in Clark County? A. Yes, I saw him in 1941.

Q. Was he driving the truck at this time?

A. Yes, sir.

Q. In 1939 when you saw him did he have a passenger with him? A. Yes, sir.

Q. In this truck? A. Yes, sir.

Q. Did you know the passenger?

A. No, sir.

Q. Was it a male or female? A. Female.

Q. How many times did you see him in that county with a female in that panel truck?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

Mr. Davis: I will reframe the question.

The Court: Very well.

Q. How many times did you see this man in that county with [373] a passenger in the truck?

A. Five or six times.

Q. Would the passengers be men or women?

A. Women.

Q. Was it the same one or different ones?

(Testimony of Sid Close.)

A. Different ones.

Q. Did you have occasion to observe Mr. Hair's actions in your county? A. Yes, I did.

Q. I will ask you if you know what his general reputation in your community was during the years 1939, 1940 and 1941 for being a drunken and reckless driver or a sober and careful driver, do you know what that was, just answer yes or no?

A. Yes, sir.

Q. What was that reputation?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and no proper foundation is laid and is furthermore wholly incompetent and it does not prove nor is it an attempt to prove any allegation of the complaint.

The Court: Has it been testified in this trial that Dubois was in Mr. Hair's territory or Mr. Donnelly's territory?

Mr. Merrill: That would be wholly immaterial.

Mr. Davis: I will ask permission to withdraw [374] this witness and recall Mr. Donnelly for further cross examination under the rule.

The Court: You may do so.

No. 11137

United States
Circuit Court of Appeals

For the Ninth Circuit.

R. J. REYNOLDS TOBACCO COMPANY,
a Corporation,

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY
ANN NEWBY, both minors, by their guardian
ad litem, George H. Newby,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 331 to 541

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for the District of Idaho
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No. 11137

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Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division

L. R. DONNELLY,

recalled for cross examination under the rule by the plaintiffs, having been heretofore duly sworn, testifies as follows:

Cross Examination

By Mr. Davis:

Q. Mr. Donnelly, was Clark County, Idaho, in Mr. Hair's territory as a salesman for the Reynolds Tobacco Company during the year 1939?

A. Yes, sir.

Q. And was it in his territory during the year 1940? A. Yes, sir.

Q. And was it in his territory during the year 1941? A. Yes, sir.

Q. And during the year 1942?

A. Yes, sir.

Q. Was it in his territory during all of the time he worked for you in Idaho?

A. Yes, sir.

Mr. Davis: That is all.

Mr. Merrill: No questions.

SID CLOSE,

being recalled, having heretofore been duly sworn, testifies as follows:

Direct Examniation—(Continued)

By Mr. Davis:

Q. You understand from the ruling of the Court that your answer to the last question asked will be "good" or "bad," if his reputation was that of

(Testimony of Sid Close.)

a good, careful, sober driver then your answer will be "good" and if not, then your answer will be "bad," you understand that, do you?

A. Yes, sir.

Q. All right, what was that reputation?

Mr. Merrill: And we make the same objection.

The Court: Yes, and he may answer.

A. Bad.

Mr. Davis: That is all, you may examine.

Q. Did you ever see Mr. Hair in an accident?

A. Yes, sir.

Q. What accident?

A. What kind of accident,—oh no, I never saw him in an accident.

Q. You never saw him driving an automobile under the influence of liquor?

A. Yes, sir.

Q. When was that, in 1939?

A. Yes, sir.

Q. How many times? [376]

A. Once that day.

Q. He had no accident that day?

A. No, sir, not that I know of.

Q. He had no accident that you know of?

A. Only what I heard about this other place.

Q. You are basing your conclusion on what these other officers said about Hair's reputation, and the other trial that you attended?

A. No, sir.

Q. Then upon what do you base it?

A. What I saw myself.

Q. On what you saw?

A. Yes, sir.

Q. And nothing else?

A. No, sir.

Mr. Merrill: Now we move to strike his testi-

(Testimony of Sid Close.)

mony touching the reputation be stricken, he testifies that it is based on his own knowledge and nothing else.

The Court: It may be stricken.

Mr. Merrill: That's all.

Redirect Examination

By Mr. Davis:

Q. Do you know, did he have a reputation in your county other than just your own personal opinion? A. Yes, sir. [377]

Mr. Merrill: We object to that, it is no way to prove reputation.

The Court: The answer may stand.

Q. What was that general reputation in your community as to whether he was a drunken, reckless driver or a sober, careful driver? Answer that good or bad.

Mr. Merrill: We make the same objection to this question that we heretofore made to it.

The Court: I think this is repetition,—perhaps not, in the state the record is in now. He may answer.

A. Bad.

Mr. Davis: That is all.

Recross Examination

By Mr. Merrill:

Q. Where did you get the opinion that you say his reputation was bad?

A. From several parties.

(Testimony of Sid Close.)

Q. Who?

A. I wouldn't say who, but I had several parties ask me why I didn't pick up that fellow for reckless driving.

Q. That was the time back in 1939?

A. No. I heard since that time, and before then.

Q. They ask why you didn't pick him up?

A. Yes, sir.

Q. That is all you heard. [378]

A. Yes, sir.

Q. They asked why you didn't pick him up?

A. Yes, sir.

Q. Who are they?

A. The attorney there for one.

Q. Who is he? A. Bill Renfrew.

Q. That is the only time anyone spoke to you about it?

A. Before I arrested him.

Q. Not since that time? A. Yes, sir.

Q. You mean you never heard anything since that time? Since 1939? A. Oh, yes.

Q. What?

A. That he was a reckless driver.

Q. But you can't tell us who it was that told you? A. No, sir.

Q. Nor anyone that said anything like that?

A. No, sir.

Q. Nor where you got the information?

A. No.

Mr. Merrill: That is all.

(Testimony of Sid Close.)

Mr. Davis: That's all. [379]

Mr. Merrill: We move to strike the testimony of this witness as being incompetent, irrelevant and immaterial. It does not meet the necessary requirement of such testimony in that there is no showing that it came to the knowledge of defendants or either of them.

The Court: The motion will be denied for the present, it may stand.

BEN BUSKIRK,

being called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Ben Buskirk.

Q. Where do you live? A. Boise, Idaho.

Q. What is your business or profession?

A. Police officer.

Q. Prior to living in Boise, where did you live?

A. Pocatello.

Q. Do you know Rulon D. Hair?

A. Yes, sir.

Q. I call your attention to the Myers incident in April 1939. Did you see Mr. Hair on that morning? I think it was the 15th of April.

A. Yes, sir. [380]

(Testimony of Ben Buskirk.)

Q. Where?

A. I saw him on two different occasions.

Q. Where? A. At the El Rio night club.

Q. Did he have a motor vehicle?

A. Well, it was setting in front of the building.

Q. Did you notice any writing on that car, or any advertising? A. Yes, sir.

Q. What did it have on it,—the car?

A. Reynolds,—R. J. Reynolds Tobacco Company.

Q. Did you see Mr. Hair later?

A. Yes, sir.

Q. In that same truck or car? A. Yes, sir.

Q. Where was he the second time?

A. I saw him going through the underpass on Center going east.

Q. On Center street? A. Yes, sir.

Q. What time was that?

A. Around four or four-thirty in the morning.

Q. Was anybody in the truck with him at that time? A. Yes, sir.

Q. Was it a man or woman? A. Man.

Q. Later you saw him at the El Rio Club?

A. Earlier.

Q. Did you see Hair's companion or passenger prior to the time he went under the underpass?

A. No, sir, I never noticed anyone before that, in the truck.

Q. Did you later learn who was with him in that truck? A. Yes, sir.

Q. Who was with him?

(Testimony of Ben Buskirk.)

A. His name was Eckersley.

Q. Mr. Buskirk, do you know the general reputation in this community of Mr. Hair, confining your answer to 1939, 1940 and 1941, in this community for being a drunken, reckless or a sober and careful driver? Do you know that reputation?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and no proper foundation laid. The question is bad in form. No proof that any such information, if such existed, ever came to the defendants' knowledge.

The Court: Did this witness live here during that period of time?

Q. Did you live in Pocatello in 1939, 1940 and 1941? A. Yes, sir.

The Court: He may answer.

A. Yes, sir.

Q. What was that reputation?

Mr. Merrill: We make the same objection.

The Court: Same ruling.

A. It is bad.

Mr. Davis: That's all, Mr. Buskirk.

Cross Examination

By Mr. Merrill:

Q. When did you first become acquainted with Mr. Hair?

A. After this Myers incident, I knew him by sight before that.

(Testimony of Ben Buskirk.)

Q. Before that you never saw anything out of the way about him, did you Mr. Buskirk?

A. I never noticed him before.

Q. Before the so-called Myers incident there was never anything wrong so far as you know?

A. I didn't know him before.

Q. You never heard anything?

A. No, sir.

Q. You were one of the officers that investigated the Myers incident, were you?

A. No, sir.

Q. You were one of the officers connected with that case in some way? A. No, sir.

Q. You made an examination of it?

A. No, sir.

Q. You testified here before? [383]

A. I was following in my personal car.

Q. You were a police officer then?

A. No, sir.

Q. When did you become a police officer?

A. September 9, 1941.

Q. You worked under Mr. Pugmire?

A. Mr. Pugmire was just leaving and I think Mr. Rubideaux came in as Chief of Police.

Q. The Myers incident was the only incident that you had personal knowledge of, was it?

A. I don't understand the question.

Q. The Myers incident was the only incident of which you had personal knowledge of Mr. Hair's driving that could be considered in anywise out of the way? A. It is a long time since then.

(Testimony of Ben Buskirk.)

Q. I mean now, between the date of the Myers incident and September 1942? A. No, sir.

Q. What else?

A. Just general talk of the police officers and the public.

Q. Who of the public did you hear?

A. The general public.

Q. Mr. Buskirk, can you give us a single name?

A. - I will say no to that question. [384]

Q. As a matter of fact, you only have knowledge of one incident and that was the Myers incident where any reckless driving was thought of or charged against him, that is a fact, isn't it?

A. Other than what I just testified to?

Q. That is the only incident of which you had any personal knowledge, that is a fact is it?

A. As far as an accident or anything of that sort is concerned, yes, sir.

Q. Then you had no knowledge of any accident or any improper driving on the part of Mr. Hair or charged against him between the time of the Myers incident and the happening at Montpelier, which we are trying now?

A. No official report.

Q. No official report came in against him between those two dates, that you know of?

A. No, sir, no official report.

Q. Such information as you have is what you talked over with Pugmire? A. No, sir.

Q. With Mr. Pugmire and other officers?

(Testimony of Ben Buskirk.)

A. Just what other officers have seen on the street.

Q. What officers talked to you?

A. I cannot say off-hand.

Q. You can't give the name of any of them?

A. No, I don't think so.

Q. You know what the National Safety Council incorporated is do you? A. Yes, sir.

Q. Are you a member? A. No, sir.

Q. Have you attended their meetings?

A. Yes, sir.

Q. You know that they give awards?

A. Yes, sir.

Q. For careful and experienced driving?

A. Yes, sir.

Q. These awards are not given to those who have bad reputations, are they?

Mr. Davis: I object to that as calling for a conclusion of the witness.

The Court: I think he may answer.

A. They are based on reports. The point is that the most important thing is if an accident is not reported for a year I think that is as far as the examination goes.

Q. Do you have any definite information on that? A. I cannot quote any authority.

Q. You know that they give awards to those reported to be careful drivers? A. Yes, sir.

Q. One to whom such an award is given is considered as such careful driver in this community?

(Testimony of Ben Buskirk.)

Mr. Davis: Objected to as calling for a conclusion of the witness.

The Court: Sustained.

Q. Would such an award be given to one who had a bad reputation for driving?

Mr. Davis: Objected to as calling for a conclusion, and it is incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Merrill: That is all.

Mr. Davis: That's all.

Mr. Merrill: I move that the testimony of the witness be stricken on the ground that it appears that it is not based on the general reputation in the community. That there is no sufficient evidence supporting it; that it is incompetent for any purpose, no sufficient evidence to support it and that it didn't come to the attention of the defendants or either of them.

The Court: I think he did say that he heard it generally discussed. The motion will be denied. The weight of the testimony will be a question for the jury.

FREDERICK SMULLEN,

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

(Testimony of Frederick Smullen.)

Direct Examination

By Mr. Davis:

Q. State your name, please?

A. Frederick H. Smullen.

Q. Where do you live?

A. Pocatello, Idaho.

Q. How long have you lived there?

A. For twenty-eight years.

Q. What is your business or occupation?

A. Police officer.

Q. Do you know Rulon D. Hair?

A. I know him by sight.

Q. You know him by sight? A. Yes, sir.

Q. Were you on duty as a police officer in the morning of April 15, 1939? A. Yes, sir.

Q. Did you see Mr. Hair at that time?

A. Yes.

Q. Did you see him in any kind of vehicle?

A. Yes, sir.

Q. What kind of vehicle or conveyance was he driving? A. A panel body truck. [388]

Q. That was at the time of the Myers accident?

A. Yes, sir.

Q. Did he have a passenger with him at that time? A. Two got out of the car or truck.

Q. Who got out besides Mr. Hair?

A. A man got out that gave his name as Eckersley.

Q. Did you know of a search made of the truck at that time?

(Testimony of Frederick Smullen.)

A. I took Mr. Myers to the hospital and didn't go back for some little time.

Q. What was Mr. Hair's condition at that time, as to whether he was intoxicated or not?

Mr. Merrill: Objected to as calling for a conclusion of the witness, it is incompetent and no proper foundation is laid for such a question.

The Court: The objection is overruled.

A. He appeared to me as though he was intoxicated.

Q. What was the appearance of Mr. Eckersley?

A. He appeared to me as though he was intoxicated, too.

Q. You have lived in Pocatello during all of the time you have been on the police department?

A. Yes, sir.

Q. Then, during the last ten years you have lived here? A. Yes, sir.

Q. Did you, or do you know the reputation of Rulon D. Hair in this community as to being a reckless, drunken [389] driver, or a sober, careful driver? A. No.

Q. You don't know? A. No, sir.

Mr. Davis: That's all.

Mr. Merrill: No questions.

Mr. Davis: We offer in evidence plaintiff's exhibit 24, being a certified copy of the information in the case of State v. Hair and the jury's verdict. We offer it for the purpose, not of proving the fact, but of proving notice to Mr. Donnelly the agent of the Company who has personally at the trial, for

the purpose of showing the charge against Mr. Hair of which Donnelly had notice and knowledge.

Mr. Merrill: Objected to as incompetent, immaterial and irrelevant and no proper foundation is laid and it does not prove any issue in this case and is contrary to the decision of the Court in the case before.

The Court: I think Mr. Donnelly testified quite fully about this. The objection is sustained.

Mr. Davis: If the Court please, I now offer in evidence exhibit H in the deposition of Mr. Darr at page 36 which the Court ruled I might reoffer at this time. [390]

Mr. Merrill: To which we object upon the ground that it is incompetent, irrelevant and immaterial for any purpose and does not prove or tend to prove any matter involved here; that there has been no different presentation of the evidence since your Honor ruled it was inadmissible. The matter contained therein is not pertinent to this case, and it may be misunderstood and prejudicial.

Mr. Davis: First, if your Honor please, I offer to prove, and now ask permission to read to the jury the Caption of the complaint as found on page 23 of Plaintiff's exhibit "A" in the Deposition of Mr. Darr, the caption of the suit,—or of the complaint rather, shows a suit by Bertha Myers and others against the Reynolds Tobacco Company, Donnelly and Hair, being the complaint produced by Mr. Darr in his testimony that they sent certain exhibits to the attorneys, and I would like to read

sufficient of paragraph five on page 24 of the Deposition of Mr. Darr to show that it was charged against the Company, that Hair had full authority to operate their trucks,—down to the semi-colon on page 25 which I have marked for your Honor, and then I ask permission to read the prayer of the Complaint showing the demand for damages and relief sought, and the date the summons was served and the certification or verification. [391]

Mr. Merrill: We object to this as incompetent, irrelevant and immaterial, and does not prove or tend to prove any issue in this case. We have spent more time trying the Myers case than the case at bar.

The Court: It will be admitted, except the prayer for judgment. Just leave out the amount prayed for, the damages.

Mr. Merrill: May we have our objection go to that?

The Court: Yes.

Mr. Davis: Now on page 36 the last paragraph on that page. That being a letter from Mr. Roe to the Reynolds Tobacco Company bearing date of April 23, 1939, and being Plaintiff's exhibit H in Mr. Darr's deposition.

Mr. Merrill: May we have the same objection to this offer?

The Court: Yes, and I will admit that part reading: "As soon as we arrived in Pocatello, we called on Mr. Black, who is Mr. Hair's attorney. He rehearsed the accident to us right from his

window as the street is in plain view from his window.”

Mr. Black: I think the other portion about getting him out on parole and from information he had the case would come up in June, should go in.

The Court: I will admit the first part as I indicated.

Mr. Davis: The record may show I offered all of it.

The Court: Yes, it may so show.

Mr. Davis: Now on page 37, I offer the last two paragraphs on the page.

Mr. Merrill: We would like to have our same objection to that offer.

The Court: It may be admitted.

Mr. Davis: Now on page 38, the second and third paragraphs on that page.

Mr. Merrill: To which we object on the ground that it would be incompetent, irrelevant and immaterial and prejudicial. It doesn't tend to prove any issue in this case.

The Court: I cannot see that this is material, I will sustain that objection.

Mr. Davis: I offer the last paragraph on page 38 and over on the other page. I offer this because of the advertising feature.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not tending to prove any issue in the case.

The Court: That may be admitted. [393]

Mr. Davis: Now, I want to reoffer my exhibit 24 with this explanation. If your Honor please,

while Mr. Donnelly testified about this trial it is not in the record what this man was tried for. The information states what he was tried for; that he drove a motor vehicle upon a public highway carelessly and heedlessly without due caution and circumspection, and at a speed and in a manner so as to endanger and likely to endanger any person thereon, and at said time and place did then and there drive and operate a motor vehicle as aforesaid while under the influence of intoxicating liquor and that by reason of the acts afore alleged, the automobile driven by the defendant as aforesaid, without malice, did strike one Jacob Myers. I want to call this to your Honor's attention. This is in the correct name of Rulon D. Hair. In the other trial it was denied this was the same person in the Clark County case. But this is in the correct name. There is something said in the opinion of the Circuit Court that they are not required to search the records,—now here is the record,—a record of conviction that shows the charge in the proper name, used at the trial which Mr. Donnelly attended. (Further argument.)

Mr. Merrill: We certainly object to the introduction. The only thing it tends to prove was the Myers incident, which was absolutely held to be [394] error and not sufficient to establish or prove or brand this man as an incompetent driver. There is no foundation laid and it would be prejudicial.

The Court: I think it is admissible under the ruling of the Circuit Court when it was up before. At that time they said the record was not constructive notice and the absence of proof was not sup-

plied. Here we have, not only the presumption of notice, but the actual knowledge of the Court record itself. I will admit it at this time.

I suggest at this time that there may be another serious question raised as to this and I will admit it at this time and it may remain in the record so that if it is submitted to the jury you can use it or refer to it in your argument to the jury, and not read it at this time.

PLAINTIFF'S EXHIBIT No. 24

Admitted Mar. 21, 1945

Prosecuting Attorney's Information.

Examination Held.

In the District Court of the Fifth Judicial District
of the State of Idaho, within and for the
County of Bannock

STATE OF IDAHO,

Plaintiff,

vs.

RULON D. HAIR,

Defendant.

PROSECUTING ATTORNEY'S
INFORMATION

C. M. Jeffery, Prosecuting Attorney in and for Bannock County, State of Idaho, who, in the name and by the authority of said State prosecutes in its behalf, in proper person comes into said District Court in the County of Bannock, State of Idaho on the 19th day of May, 1939, and gives the Court

to understand and be informed that Rulon D. Hair is accused by this information of the crime of Involuntary Manslaughter which said crime was committed as follows, to-wit: That the said Rulon D. Hair on or about the 15th day of April, 1939, and before the filing of this information at Pocatello in the County of Bannock, State of Idaho, then and there being, did then and there knowingly, willfully, unlawfully and feloniously drive and operate a motor vehicle upon a public highway, to-wit: The streets of Pocatello, State of Idaho, and particularly on East Center Street, at a point in the three hundred block of said street, carelessly and heedlessly in wilful and wanton disregard of the right and safety of others, without due caution and circumspection, and at a speed and in a manner so as to endanger and likely to endanger any person thereon, and at said time and place did then and there drive and operate a motor vehicle as aforesaid while under the influence of intoxicating liquor, and that by reason of the acts afore-alleged, the automobile driven by the defendant, as aforesaid, without malice, did strike one Jacob Meyers, a human being, thereby inflicting upon the said Jacob Meyers mortal wounds from the effect of which he, the said Jacob Meyers, died.

All of which is contrary to the form, force and effect of the statute in such case in said State made and provided and against the peace and dignity of the State of Idaho.

That the said Rulon D. Hair on the 20th day of April, 1939, was brought before a committing Magistrate, to-wit: The Honorable William Hinck-

ley, Justice of Peace, Pocatello Precinct, Bannock County, State of Idaho, to be examined on the aforesaid charge, according to law: and was then and there by the said Magistrate advised of his statutory rights in the premises.

Thereupon, the said Rulon D. Hair was by the said Magistrate in open Court duly examined on the aforesaid charge according to law, and was then and there by the said Magistrate held to answer said charge in the District Court of the Fifth Judicial District, State of Idaho, within and for the County of Bannock.

C. M. JEFFERY

Prosecuting Attorney, Bannock County, Idaho.

State of Idaho, County of Bannock—ss.

I, Anna Keefe, Clerk of the District Court of the Fifth Judicial District, in and for the County of Bannock, State of Idaho, do hereby certify that the foregoing is a true and correct copy of the original information filed in my office on the 19th day of May, 1939.

In Testimony Whereof, I have hereunto set my hand and official seal this, the 19th day of May, 1939.

..... Clerk.

..... Deputy.

Names of Witnesses known to Prosecuting Attorney at the time of the filing of this Information: Dr. H. H. Hughart, Ray Swallow, Don Robinson, F. H. Smullen, Arthur P. Hall, Y. D. Black, L. F. McKinnon, Robert M. Pugmire, A. R. Decker, Lee Bellah, Guy Nelson, Beth Robbins, Gretta Chambers, Anna Keefe, Art Olson, Edna Locke, L. W. Cox, Tom Rush, A. L. Oliver.

Filed in open District Court and made a record of said Court this 22 day of May, 1939.

ANNA KEEFE, Clerk.

C. M. JEFFERY, Prosecuting Atty.

[Title of State District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find defendant guilty as charged in the information and we the Jurors recommend all leniency possible.

J. P. JENSEN, Foreman

[Endorsed]: Filed Dec. 3, 1939. [109]

[Title of State District Court and Cause:] B 1591.

Register No. B 1591

CERTIFICATE

I, Anna Keefe, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, hereby certify that the original files in the above entitled cause are on file in my office; that I have custody and control of the same and that the same are official records of the Fifth Judicial District of the State of Idaho, in and for Bannock County;

That the above and foregoing Prosecuting Attorney's information and verdict are true and correct copies of the originals on file in my office and that the verdict rendered is the verdict rendered upon the trial of the defendant, Rulon D. Hair, upon the charges set out in the Prosecuting Attorneys Information.

Dated this 16th day of March, 1945.

(Seal) (Sgd.) ANNA KEEFE, Clerk

Mr. Davis: Very well. I want to reoffer plaintiffs' exhibit 23 now which has been definitely identified as the Sunday Tribune Journal, published at Pocatello, Idaho, on Sunday, April 16, 1939, carrying the story or a news item concerning the death of Jacob Meyers, who was struck and killed by Rulon D. Hair, the article generally states that Mr. Hair was arrested and that he is charged with speeding and with being intoxicated,—I offer to prove by calling witnesses that it was the only local daily newspaper published in [395] Pocatello, at that time, and that it was the only newspaper published and placed on the news stands in Pocatello on Sunday, April 16, 1939. I do not offer it for the purpose of proving the facts therein set forth, but for the purpose of proving notice of the charges made against Hair at a time when Mr. Donnelly was in Pocatello, and at a time when Mr. Donnelly had been sent to Pocatello by his superior for the purpose of making a complete investigation and for the purpose of showing that it must have been the clipping that he sent to his superior. And regardless of whether it was or not, it charges him with notice. (Further argument.)

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. It has never been identified as the one press notice sent to the Company by Mr. Donnelly. If it goes in and goes before the jury, they will read it and use it for all purposes and it becomes prejudicial. If counsel had wanted the one sent to the Company, the rules provide a simple method of procuring it. We don't know whether

this is the one that was sent in or not. At this time it becomes highly prejudicial and improper to permit its admission at this time.

The Court: It doesn't seem to me that sufficient foundation was laid to admit it. I take it [396] that the newspaper publication would stand in the same position that the Court record of the Dubois matter stood. That it would not be constructive notice of what it contained, unless it can be shown by more positive testimony than is now in the record that either Mr. Donnelly or someone connected with the Tobacco Company read this paper. Mr. Donnelly did not admit,—although I will admit that I was not very much impressed by his testimony in that regard,—and I am saying this in the absence of the jury,—He would not admit that this was the notice which he sent, the presumption is very strong that it was the notice or clipping. Unless you have some authority on the question of whether a newspaper,—a local publication, in the community in which the man resides or is at the time, is in any way notice to him of anything it contains, I think I will deny its admission at this time.

The record may show that this was reoffered and objected to and that the Court sustained the objection.

(Whereupon the Jury was called into the Court room.)

Mr. Davis: May I proceed.

The Court: Yes, you may go ahead.

Mr. Davis: Now, I am reading from the exhibits which have been admitted by the Court. First

I will read the caption of a complaint filed in another action, and [397] this is a portion of Exhibit "A" attached to the deposition of Mr. Darr which has been read here: "In The District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock. Bertha Myers, Jacob D. Myers, Mary Holly, Henry Myers, Ida Woods, Bertha Pieper, Evelyn Myers Hanson, Leona Weiland, George Myers, Robert Myers and Melba Dunn, Plaintiffs, vs. R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, Defendants. Complaint." Now I will read paragraph five of the complaint which appears on page 24 of the deposition of Mr. Darr: "That at all times hereinafter mentioned and particularly on the 15th day of April, 1939, between the hours of four and five o'clock in the morning of said day, the defendant Rulon D. Hair was an agent, servant and employee of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly; that in connection with the employment of the defendant L. R. Donnelly and R. J. Reynolds Tobacco Company, it was part of the duties of the defendant Rulon D. Hair to operate and drive a certain motor vehicle, or truck, which said truck was a Chevrolet job delivery truck, and bearing Bannock County, Idaho, license number 3A-41; that it was at all times hereinafter mentioned and particularly on the 15th day of April, 1939, at the hour of between four and five [398] o'clock in the morning of said day, it was the duty of said defendant, Rulon D. Hair as such agent, servant or employee of the defendant L. R.

Donnelly and R. J. Reynolds Tobacco Company, to haul, transport and have in his possession in said motor vehicle a stock or quantity of goods consisting of cigars, cigarettes, and tobaccos produced and manufactured by the defendant R. J. Reynolds Tobacco Company, and for sale by the defendant R. J. Reynolds Tobacco Company and L. R. Donnelly, through and by the defendant Rulon D. Hair, it being the duty of said Rulon D. Hair to drive and operate said truck and to haul said stock of tobaccos, cigarettes, etc., in said truck from place to place in Bannock County, Idaho, and in other counties throughout the Southeastern portion of Idaho, said Bannock County, and other counties throughout the southeastern portion of Idaho being the territory allotted to the defendant, Rulon D. Hair, by the defendant L. R. Donnelly and R. J. Reynolds Tobacco Company within which to solicit orders and canvass the trade generally; that it was further a part of said defendant Hair's duty, as an employee of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, to post and distribute advertising materials and matters, advertising the goods, wares, and merchandise manufactured by said Tobacco Company [399] and for sale by said defendant Donnelly and R. J. Reynolds Tobacco Company."

Now I am about to read from a letter which appears on page 36 of the deposition: "As soon as we arrived in Pocatello we called on Mr. Black, who is Mr. Hair's attorney. He rehearsed the accident to us right from his window as the street is in

plain view from his window.” That was dated April 28, 1939, and was written by Mr. Roe to the Reynolds Tobacco Company. Now I am about to read from page 37 of the deposition, this is a portion of the same letter: “In the late evening Mr. Donnelly and I invited Mr. and Mrs. Hair over to the hotel to talk things over. Found Mrs. Hair very pleasant and willing to cooperate with her husband in every way possible and assist him to the extent of placing her application with two of the stores, one of which she already had been working part time.

It certainly was understood between Mr. Hair and myself that at no time was he to use company car, only when on Company business 100%. Mr. Hair remarked he thoroughly understood these instructions which would be strictly adhered to. Mr. Hair said it wasn’t necessary for him to take company car out at such an hour in the morning as he could of used his personal car just as well, however, he thought as he would be getting [400] it out in about two hours anyway he would just use it in taking Mrs. Hair to the station. Of course, this turned out to be a bad thought on his part.”

Now, I will read from the bottom of page 38 of the deposition, a portion of the same letter: “Might also mention, all across Mr. Hair’s assignment today, I noticed a very good showing of outside advertising matter, in other words, I believe this salesman is trying to get places with the Company.”

Now, I will go back and read another paragraph of the Complaint which the Court said I would be

permitted to read, this is from page 30 of the deposition. "Wherefore, plaintiffs pray judgment against the defendants and each of them for damages, and for costs of suit and general relief. Anderson, Bowen & Anderson, Attorneys for plaintiffs. Residence, Pocatello, Idaho. Verified by Jacob D. Myers as one of the plaintiffs, before Clyde Bowen, Notary Public for Idaho, on June 14, 1939. Summons issued June 14, 1939."

In accordance with the ruling of the Court, I will not read exhibit 24 at this time.

The Court: Yes, but it was admitted.

Mr. Davis: The plaintiff rests.

The Court: I will excuse the jury at this time, and they may be excused until 2 o'clock, but they will not return to the Court room until called for by the Court. [401]

Mr. Merrill: I have a motion to make at this time.

Mr. Davis: First, Mr. Merrill, we have a witness here who is very anxious to get home and his evidence, if used at all, will be in rebuttal. It is very short and I was wondering if we could take it and let him go home and if used, it could be read by the Court reporter at the proper time with the same effect and subject to the same objections as if he was on the stand. And it could be put in the record at the proper place by the reporter.

Mr. Merrill: We can agree on that.

The Court: Very well, you may state your motion and we will hear your arguments later.

Mr. Merrill: Comes now the defendants Donnelly and R. J. Reynolds Tobacco Company, the

plaintiffs having rested and moves the Court for a judgment of nonsuit on that charge of the amended complaint contained in paragraph 7, reading as follows: "That at all times herein mentioned the said defendant Rulon D. Hair had permission and authority from the said R. J. Reynolds Tobacco Company and L. R. Donnelly, to use and operate said Chevrolet panel truck upon the public highways of the State of Idaho, notwithstanding that at all of said times the said Tobacco Company and Donnelly [402] knew that Rulon D. Hair was a careless, reckless, drunken and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions," and such other allegations as would be pertinent thereto. Upon the grounds and for the reasons that the evidence wholly and completely fails to warrant the case in going to the jury upon such grounds because:

1. There is no competent evidence proving that Hair was a reckless, drunken and incompetent driver, or

2. That there is no evidence that the defendants or either of them had any knowledge of any kind or character as to,—tending to prove or proving such a fact if it actually existed or really existed.

3. Upon the further ground that such evidence as was introduced touching the carelessness and recklessness if any existed in the so-called Myers incident was merely an incident and wholly insufficient upon which to predicate a verdict of the jury.

4. That the testimony of the witnesses called by the plaintiffs attempting to prove the reputation of

Hair to be bad was wholly insufficient to prove or tend to prove either that such existed or that the defendants or either of them knew or had knowledge of any kind or character thereof. [403]

5. Defendants further move for judgment of nonsuit upon the remaining allegations of the said complaint.

The Court: The Court will take the first motion under advisement until counsel can present it fully.

Mr. Merrill: Defendants move further for a judgment of nonsuit upon the entire complaint upon the grounds that the evidence is insufficient to justify a verdict of the jury thereon, more particularly in each and all of the particulars mentioned in the motion heretofore made for a nonsuit on the limited portion of the said complaint, and further upon the following grounds:

1. That there is no sufficient or competent evidence in the record to show that Rulon D. Hair was acting within the scope of his employment at the time of the accident, and injury to Avenel Newby, but on the contrary, the evidence clearly shows that he was violating the instructions of the Company and that he was on a party of his own and the evidence is insufficient to show any waiver of these instructions.

The Court: And that is also taken under advisement by the Court.

Mr. Merrill: Come now the defendants Donnelly and Reynolds Tobacco Company and in the event that the motions for nonsuit be denied or that the motions of nonsuit [404] or request that that portion of the action be taken from the jury which is con-

tained in paragraph seven of the amended complaint, moves the Court in such event that the plaintiff be required to elect upon which of said theories of their complaint they will rely for judgment. That is to say, whether they will rely upon the theory that Hair was acting within the scope of his employment when driving Avenel Newby as a guest or whether they will attempt to rely upon the theory that Hair was an incompetent, drunken and reckless driver and known as such to these defendants.

The Court: Now, I understand that counsel want to proceed with the case so that some of the witnesses who wish may be excused and this matter can be taken up later.

(The jury was recalled and the following proceedings had):

3:30 P. M. March 21, 1945

The Court: You may proceed,

CARL OXENBINE,

being called as a witness on the part of the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. State your name, please?

A. Carl Oxenbine. [405]

Q. Where do you live?

(Testimony of Carl Oxenbine.)

A. Montpelier, Idaho.

Q. How long have you lived there?

A. Thirty-two years.

Q. What is your occupation?

A. Mechanic.

Q. Where are you working now?

A. The Bear Lake Motor Company.

Q. The Bear Lake Motor Company?

A. Yes, sir.

Q. Is that the Ford Garage?

A. That is the Ford Garage.

Q. Were you working there in September, 1942?

A. That is correct.

Q. Did you have occasion to go, with the wrecker, out to where a car was off the highway?

A. Yes, that's right.

Q. Between Montpelier and Soda Springs?

A. Yes, sir.

Q. Do you remember the date you went out there?

A. Not exactly.

Q. Who went out with you?

A. Mr. Hair and Cecil Thomas, an employee of the garage.

Q. Is that Mr. Hair, Rulon D. Hair?

A. Yes, sir. [406]

Q. What time of the day did you go out?

A. Shortly after six o'clock.

Q. In the evening?

A. Yes, sir.

Q. Did you observe the automobile after you got out there?

A. That's right.

(Testimony of Carl Oxenbine.)

Q. What, if anything, was the condition of the automobile?

A. It was upside down with the right front tire blown out.

Q. What is the fact as to the tubing on that tire?

A. The tubing of the tire was sticking out between the rim and the tire.

Q. How long an opening was there in the tire?

A. That I cannot say.

Q. What size tire was it? A. 600 x 16.

Q. Is that a baloon tire or not? A. No.

Q. Did you observe the right of way?

A. I noticed some tracks on the right side of the road?

Q. Where were these with reference to the oiled portion of the road or highway?

A. Right along the west side of the oil road on the shoulder.

Q. How long were the tracks?

A. I imagine about two hundred feet.

Q. What was the condition of the weather that day? A. It had been raining. [407]

Q. What was the condition of the shoulders of the right-of-way? A. Muddy.

Q. How deep was this track along on the west side of the oiled portion of the highway?

A. I would judge three and a half to four inches.

Q. How wide was it?

A. I would be unable to say for sure.

Q. Did you follow the track that you noticed out on the west side of the oil pavement that was on the

(Testimony of Carl Oxenbine.)

shoulder, and came over on the oiled portion of the road and then follow up to the car, to where it was upside down?

A. The only tracks I observed was the last track the car made off the oil in the mud after it took across the highway.

Q. You saw where it came out of the mud up on the oiled road and across the highway?

A. Yes, sir.

Q. Did that follow to where the car was upset?

A. Yes, sir, that went to where the car was turned over, that is right.

Q. Then the markings from the west side of the oiled pavement crossed the highway over the highway to the east?

A. That's right.

Q. How long did the track go along down on the west and on the oiled pavement?

A. Straight across the highway. [409]

Q. What direction was the car traveling?

A. South.

Q. Is that toward Montpelier or away from it?

A. Toward Montpelier.

Q. From Soda Springs?

A. Yes, sir.

Q. About where, with reference to Soda Springs did the accident occur?

A. Well I would say approximately ten miles from Soda Springs.

Q. About ten miles.

A. I would say approximately that.

Q. South?

A. South, yes, sir.

(Testimony of Carl Oxenbine.)

Q. What kind of a borrow-pit was there, if you remember?

A. I would say the borrow-pit was about three feet deep.

Q. Did you make any examination of the tire to determine what caused the blow-out?

A. I did not.

Mr. Merrill: That is all. You may examine.

Cross Examination

By Mr. Davis:

Q. You went out with Mr. Hair?

A. That's correct.

Q. What was the principal reason you went out?

A. To pick up this automobile.

Q. Can you see this plat? [409]

A. Yes, sir.

Q. Were you in the room when Mr. Bunderson testified from this plat? A. Yes, sir.

Q. Calling your attention to what is marked "car" here, show the jury the part of the track that you saw there?

A. I have to find out which way is north and south.

Q. This is north and this is south (indicating).

A. I observed the tracks that came on this side, this sixty-six feet. That is the track that I observed, this went across the road here.

Q. You didn't go back up the road and follow the tracks? A. No, sir.

(Testimony of Carl Oxenbine.)

Q. Did Hair ask you to? A. No, sir.

Q. Did he say anything to you about going up the highway and looking for the rock that caused the blow-out of the tire? A. No, sir.

Q. You say this depression in the shoulder of the road was three and a half or four inches in the mud? A. Yes, sir.

Q. Would it be the same off here (indicating).

A. I didn't see any tracks on the opposite side.

Q. When it left the oiled road did it cut three and a half or four inches down here? [410]

A. I never noticed.

Q. Where it cut down three or four inches was it on the shoulder or off the shoulder?

A. On the edge of the oiled road.

Q. Do you express any opinion as to whether there was a tire flat at any place where you noticed the roadway? A. I couldn't say.

Q. Mr. Oxenbine did you have anything to do with fixing that tire? A. No, sir.

Q. Or the tube? A. No, sir.

Q. Do you know whether it was repaired or not?

A. No, sir.

Q. Do you know whether another tire and tube was put on before the truck left the garage?

A. I think there was a spare put on.

Q. Is it a part of your business to fix or repair tires and tubes?

A. They do fix tires and tubes, but I have nothing to do with that part of the business.

Q. Have you had considerable experience,—how

(Testimony of Carl Oxenbine.)

much experience have you had as a mechanic in making examinations of blown out tires?

A. Very little. That comes under a different man. [411]

Mr. Davis: That is all.

Redirect Examination

By Mr. Merrill:

Q. What kind of a roadway,—what kind of side-line or edge was these on the oiled pavement along here, was it sharp and ragged, or did you observe that?

A. From glancing at it I would say it was wavy from where the heavy traffic had caved off the edge.

Q. You say you didn't look back beyond that point? A. No, sir, I didn't.

Q. You don't know about the markings along the highway? A. Absolutely not.

Q. Do you know whether there were markings along the center of the highway?

A. The only ones I saw was across the highway.

Q. Do you know whether there was a yellow or white line on the highway?

A. I couldn't say.

Q. Did you observe or examine the remaining tires on that car? A. No, sir.

Mr. Merrill: I think that's all.

Mr. Davis: That's all.

JACK PERKINS,

being called as a witness on the part of the defendants after being duly sworn, testifies as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your name?

A. Jack Perkins.

Q. Where do you reside? A. Montpelier.

Q. What is your business or occupation?

A. I operate an apartment house.

Q. What is the name of the apartment house?

A. The Downing Apartments.

Q. Were you engaged in that business during September of 1942? A. Yes, sir.

Q. Including September 11th, of that year?

A. Yes, sir.

Q. How long had you been engaged in the operation of that apartment house before September 11, 1942?

A. The exact date, I can't say.

Q. Would you say that it would be a year or a year and a half? A. Yes, sir.

Q. Were you acquainted with one Avenel Newby? A. Yes, sir.

Q. On September 11,—during the early part of September and up to the 11th of September, 1942, state where she was living, if you know?

A. What was the question? [413]

Q. Where was Avenel Newby living in Montpelier that month prior to September 11, 1942?

(Testimony of Jack Perkins.)

A. In my apartment.

Q. How long had she lived there prior to September 11, 1942?

A. How long had she lived there?

Q. Yes. Would you say a month or a few months. Would you say it was more than a month?

A. A month or less.

Q. Isn't it a fact that you served notice——

Mr. Davis: Now I shall object to that question before it goes any further, as leading, counsel is making a statement.

Q. Now with reference to any notice to vacate with reference to Mrs. Newby, will you state what if anything you did in that regard?

A. Yes, sir.

Q. What did you do?

A. I had complaints from several people.

Mr. Davis: We object to this. Is not responsive. He can state what he did do.

The Court: That is the only question.

A. Yes, sir. I served notice to vacate.

Q. When did you serve the notice to vacate upon the Newbys?

A. As I recall it was either a day or two before the accident.

Q. State briefly why you served such a notice to vacate? [414]

Mr. Davis: We object to the question of why. It is incompetent, irrelevant and immaterial, and the notice would be the best evidence.

The Court: Sustained.

(Testimony of Jack Perkins.)

Q. State whether or not you had complaints from other tenants with reference to the Newby Apartments?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in this case.

The Court: It would also be hearsay, sustained.

Q. Now, Mr. Perkins, how many apartments were in that apartment house?

A. Twelve.

Q. Were those apartments occupied, and kept full of people at that time?

A. Yes, sir, at that time.

Q. What is the character of that apartment house business so far as conducting it quietly and peaceful and respectable?

A. It is good.

Q. With reference to the conduct of your apartment house did anything occur which led you to serve this notice to vacate on the Newbys. If so, state what?

Mr. Davis: Just a moment,—no, I have no objection, he can answer that by a yes or no answer.

A. Yes. [415]

Q. State what that was?

Mr. Davis: Was this what someone said to you?

A. Yes, sir.

Mr. Davis: Objected to as hearsay.

The Court: Sustained.

Mr. Merrill: I am trying to bring out that this

(Testimony of Jack Perkins.)

man is engaged in a particular business, and that anything that comes to him having to do with this notice is not hearsay, it goes to the question of giving notice in line of the business which he is conducting——

The Court: If this is a question of the reason for vacating this apartment, of having Mr. and Mrs. Newby vacate this apartment, I think he would be confined to his own knowledge and not what someone else told him.

Mr. Merrill: Mr. Newby testified that he knew that the notice was there at the apartment on Sunday after the accident. It came to his knowledge after he arrived home. We want to show why that notice was given by this man. He testified that he gave it prior to the accident.

The Court: The Court has ruled. The ruling will stand.

Q. What is the fact as to whether you had complaint as to Mrs. Newby's conduct, from the other tenants?

Mr. Davis: Objected to as incompetent, [416] irrelevant and immaterial. It has nothing to do with the notice served. It has only to do with complaints from other tenants and would be hearsay and is entirely prejudicial.

May I ask if they are attempting to attack Mrs. Newby's character here.

The Court: The objection is sustained. He may testify to what he knows of his own knowledge why he served this notice.

(Testimony of Jack Perkins.)

Q. Why did you serve notice to vacate.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: The Court has ruled that he may testify as to his own knowledge and not hearsay.

Mr. Davis: May I ask a question?

The Court: Yes, you may ask.

Mr. Davis: Mr. Perkins, isn't it a fact that whatever you did was because of what someone else said to you. Some complaint that someone else made.

A. Yes, sir.

Mr. Davis: We renew our objection.

The Court: Sustained.

Q. Did you know of your own knowledge whether there were disturbing parties in the Newby apartment?

A. No, not of my own knowledge, no. [417]

Mr. Merrill: That is all.

Mr. Davis: That is all.

CHARLIE NICHOLS,

being called as a witness on the part of the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. What is your name?

A. Charlie Nichols.

(Testimony of Charlie Nichols.)

Q. Where do you live? A. Soda Springs.

Q. Where in Soda Springs do you live?

A. The Enders Hotel.

Q. How long have you been living there?

A. I don't know.

Q. Were you living there in September, 1942?

A. Yes, sir.

Q. Do you know Rulon D. Hair?

A. Yes, sir.

Q. Did you know him about the 11th—the 10th or 11th of September, 1942?

A. I did know him, yes, sir.

Q. Did he come,—at that time did you have anything to do with the Enders Hotel, either day or night?

A. Yes, sir. [418]

Q. What did you have to do with that hotel?

A. Clerk.

Q. Was there any other clerk at night, other than yourself, who looked after the business there?

A. No, sir.

Q. Did Mr. Hair come to the hotel in the evening or early morning of September 10th or 11th, 1942?

A. I can't remember that far back.

Q. Do you remember him coming to the hotel one night?

A. Yes, sir.

Q. About that time? A. Yes, sir.

Q. Was he alone?

A. He had a woman with him.

Q. What did he do?

A. Registered.

(Testimony of Charlie Nichols.)

Q. What did he do then?

A. Went to his room.

Q. Did the woman go with him?

A. Yes, sir.

Q. Have you been able to find the register sheets of that night?

A. No, sir, I can't do it.

Q. Then you haven't them?

A. No, sir.

Q. Is the registry sheet missing? [419]

A. Yes, sir, can't find it.

Q. Do you remember what the woman looked like?

A. No, sir,—no.

Q. They went upstairs?

A. Yes, sir.

Q. What time did you get off work?

A. About ten the next day.

Q. Did you see Mr. Hair any more the next day?

A. No, sir.

Q. Do you remember the accident that happened with Mr. Hair down there between Soda Springs and Montpelier?

A. No, I don't know a thing about it.

Q. Don't you recall the accident that happened on the highway? Did you hear about it later?

A. Yes, sir, I heard later.

Q. Was the time they came to the hotel and registered about the time of that accident?

A. I suppose it was, yes, sir.

Q. Do you know whether it was the day or night preceding the accident?

A. I couldn't say.

Q. You can't remember exactly?

A. I can't remember.

(Testimony of Charlie Nichols.)

Q. But you remember Hair coming in with a woman?
A. Yes, sir. [420]

Q. And registering?
A. Yes, sir.

Mr. Merrill: You may examine.

Cross Examination

By Mr. Davis:

Q. You don't have any idea what date that was?

A. No, sir.

Q. You don't know what date this accident happened?
A. No, sir.

Q. You don't know whether Hair came there in 1941 or 1942?
A. No, indeed, I don't.

Q. How many times did Hair come there and registered?

A. He has been coming and registering quite a while.

Q. Did he ever have a woman with him before?

A. No, sir.

Q. You don't know whether it was his wife or not?
A. I couldn't say.

Q. Did he register as man and wife?

A. I don't remember.

Q. And you don't know what date it was?

A. No, sir.

Q. You don't know who the woman was?

A. No, sir.

Q. You don't know what she looked like?

A. No, sir.

Q. What became of the hotel register? [421]

(Testimony of Charlie Nichols.)

A. Your guess is as good as mine?

Q. Have you other sheets on it?

A. The only thing I got is the 8th in 1928,—no, not 1928, the last report we have of him being there is on September 8th.

Q. What year? A. 1942.

Q. Does it show that Mr. Hair is registered on that? Registered on that date and on that sheet?

A. Sure.

Q. You haven't any other registry sheet?

A. No, sir.

Q. Do you keep them?

A. I couldn't find any more.

Q. And you couldn't find any place where Hair was registered after September 8th?

A. No, sir.

Mr. Davis: That is all.

Redirect Examination

By Mr. Merrill:

Q. He registered there quite frequently before that time? A. Yes, sir.

Mr. Merrill: That is all.

Mr. Davis: Nothing further.

The Court: We will recess until 10 o'clock in the morning. [422]

10 O'clock A. M., March 22, 1945

RULON D. HAIR,

called as a witness on the part of the defendants, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. State your name, please.

A. Rulon D. Hair.

Q. Where are you living?

A. Salt Lake City, Utah.

Q. How long have you lived in Salt Lake City?

A. I have lived there off and on for fourteen years.

Q. Where were you born?

A. Midway, Utah, and I lived in Provo.

Q. You mentioned Provo. Did you ever live there?

A. I lived there in 1929.

Q. What is your occupation?

A. At present I am a baker.

Q. How long have you been engaged in that business?

A. About eight months.

Q. Prior to that time what was your occupation?

A. I was trucking.

Q. Did you ever live in Pocatello?

A. Yes, sir.

Q. When did you live here?

A. As near as I remember, from February, 1938, until the [423] later part of September, 1942.

(Testimony of Rulon D. Hair.)

Q. Did you ever work for the R. J. Reynolds Tobacco Company? A. Yes, sir.

Q. When did you commence working for this Company? A. In July, 1937.

Q. Do you know Mr. L. R. Donnelly?

A. Yes, sir.

Q. When did you first become acquainted with him?

A. Some time prior to July, 1937, I cannot say just how long before it was.

Q. Were you working for the R. J. Reynolds Tobacco Company on the 10th day of September, 1942? A. Yes, sir.

Q. What were your duties?

A. To call on dealers and jobbers and place advertising matter and do consumer work.

Q. Did you have in your possession a truck owned by the R. J. Reynolds Tobacco Company?

A. Yes, sir.

Q. What kind of a truck was it?

A. 1941 Chevrolet sedan delivery.

Q. Under what condition was that truck delivered to you?

A. That I would use it for Company business.

Q. Did you have any right to use it for any other business than Company business?

A. No, sir. [424]

Q. At the time the truck was delivered to you was there any written agreement that you entered into? A. Yes, sir.

Q. I hand you what has been marked as defendant's exhibit 17 and I will ask you if you recog-

(Testimony of Rulon D. Hair.)

nize that? A. Yes, sir.

Q. What is it?

A. An agreement that I signed when this particular truck was delivered to me.

Q. Did you sign that agreement at that time?

A. Yes, sir.

Q. Does that contain anything touching hauling anybody other than employees of the Company?

A. No, sir.

Q. Read the last line. Now as to whether or not it contains anything as to hauling guests, what have you to say?

A. It says: "I understand that under no consideration am I to permit anyone save and except an employee of R. J. Reynolds Tobacco Company to ride with me in the said car."

Q. I hand you what has been marked as defendant's exhibit 20 and ask you if you ever received that statement? A. Yes, sir, I have.

Q. Were you in the employ of this Company, driving a truck at that time? [425]

A. Yes, sir.

Q. What if anything is said there with reference to driving the truck with anyone in it riding with you?

Mr. Davis: The reason I wanted to see it I think you said exhibit 20 and it is exhibit 26, and it is not being admitted in evidence. I have no objection to it being admitted and I think it should be before the witness is interrogated about it.

Q. Yes, that's right, now, Mr. Hair, did you get that exhibit from the Company?

(Testimony of Rulon D. Hair.)

A. Yes, sir.

Q. At the time you were working for the Company?

A. Yes, sir.

Mr. Merrill: We offer it in evidence.

The Court: It may be admitted.

DEFENDANT'S EXHIBIT No. 26

Admitted Mar. 22, 1945

Directors

S. Clay Williams
Chairman Board of Directors

Jas. A. Gray

President

R. E. Lasater

Vice President

J. W. Glenn

Vice President

John C. Whitaker

Vice President

M. E. Motsinger

Secretary

Directors

W. N. Reynolds

Chairman Executive Committee

R. C. Haberkern

Purchasing Agent

L. F. Owen

Traffic Manager

H. S. Stokes

Supt. Leaf Processing

P. Frank Hanes

Counsel

E. A. Darr

Mgr. Sales Dept.

R. J. Reynolds Tobacco Company

Winston-Salem, N. C.

November 4, 1937

S-22-C-C

To Our Salesmen Operating Automobiles:

We are sending you herewith accident report blanks. In case of accident, make out report of ac-

(Testimony of Rulon D. Hair.)

eident in triplicate, and send all three copies to your Division Manager. In case you have a serious accident, report it to us by wire and follow up your wire with a report of accident as above requested by first mail.

In filling out the report blanks it is imperative that you answer fully every question appearing thereon. If an accident occurs and you are not at fault you should endeavor to secure settlement from the party causing the accident on the spot. As we do not carry insurance covering damage to our car, we therefore have to look to the other party for damages sustained by us.

You must not carry other passengers with you when using the car, except your Division Manager or an employe of the Company.

R. J. REYNOLDS TOBACCO
COMPANY.

Defts. Exhibit 2—9/30/43 Reg—

1196—Defendant's Exhibit No. 20. Admitted Oct 22 1943

“I'd walk a mile for a Camel.” [112]

Q. Now, Mr. Hair, I will ask you, does that contain any directions touching the hauling of guests? A. Yes, sir.

Q. What does it say?

A. “You must not carry other passengers with

(Testimony of Rulon D. Hair.)

you when using the car, except your division manager or an employee of the company.”

Q. You understood that? A. Yes, sir.

Q. Did you get other similar bulletins or statements containing such language? [426]

A. From time to time.

Q. They came to you? A. Yes, sir.

Q. Did you ever make reply to them, touching that matter?

A. If reply was requested I did.

Q. I hand you letter,—defendant’s exhibit 19, is that in your hand writing? A. Yes, sir.

Q. What did you do with that letter after you wrote it?

A. I mailed one copy to the North Carolina office and one to the Salt Lake City office.

Q. Is that the original or a copy?

A. This is the original.

Q. Does that contain any statement by you touching the hauling of guests?

A. Yes, sir.

Q. What is that statement?

A. That I should never carry any passengers outside of my division manager.

Q. Now, Mr. Hair, there has been some testimony introduced in this case touching an accident that you had in April, 1939, in which it was asserted that you had taken your wife to the depot and had a man by the name of Eckersley in the car. Did you have any conversation with any of your

(Testimony of Rulon D. Hair.)

superiors of this Company following that accident touching the hauling of guests? [427]

A. Yes, sir.

Q. Where did that occur?

A. The Whitman Hotel.

Q. Who was that with?

A. Mr. L. R. Donnelly and Mr. Roe.

Q. What did they say to you about hauling guests?

A. They covered it thoroughly, that I was to understand that no more guests were to be hauled.

Q. What did they say touching your employment, if that was not understood?

A. They said if I was ever found to have a guest in the car again I would be immediately dismissed.

Q. You understood that thoroughly?

A. Yes, sir.

Q. Did you make reports to the Company?

A. Yes, sir.

Q. Periodical reports.

A. I turned them in every working day.

Q. Did you ever make a report of having hauled a guest in any company car at any time?

Mr. Davis: That is objected to, as the report would be the best evidence.

The Court: He may answer.

A. No, sir.

Q. There has been some evidence introduced that you had a guest in your car at Dubois at one time; when was that, [428] if it was so. I will with-

(Testimony of Rulon D. Hair.)

draw that. Let me ask that again. There has been some evidence introduced in which it was asserted that you were seen in Dubois, Idaho, with someone else in the panel truck. Do you know whether or not that is a fact?

A. Yes, sir; it was.

Q. When did that occur?

A. I cannot be sure, but it was in 1939 some time.

Q. Did you ever make a report of that to the Company? A. No, sir.

Q. State whether that was an isolated incident? A. I don't understand.

Q. State whether it was a single incident or whether it was your custom?

A. It wasn't my custom, however, it wasn't isolated.

Q. Did you ever do that before or after?

A. Yes, sir.

Q. How many times?

A. Several times.

Q. Who was the women you had in your car at Dubois? A. At which time?

Q. The time you mentioned.

A. A dealer of mine at Idaho Falls.

Q. An employee of the Company?

A. No, sir. [429]

Q. Did you ever report that to the Company?

A. No, sir.

Q. Did they ever find it out?

(Testimony of Rulon D. Hair.)

A. No, sir,—you mean did the company find it out?

Q. Yes, did your company ever find that out?

A. No, sir.

Q. Did Mr. Donnelly ever find that out?

A. No, sir.

Q. You understood that you would be fired immediately if they did? A. Yes, sir.

Q. Something has been mentioned here about Pond's resort. A. Yes, sir.

Q. Did you ever go up there?

A. Yes, sir, I did.

Q. Was that in your private car or in the Company truck?

A. We were vacationing in my private car.

Q. How far is Dubois from Pocatello?

A. Around a hundred miles.

Q. How far is Pocatello from Salt Lake City?

A. Around 184 miles, or 183 miles.

Q. Now, Mr. Hair, did you know Avenel Newby?

A. Yes, sir.

Q. When did you first become acquainted with her?

A. It was around August the 10th, or somewhere around there. [430]

Q. What year? A. 1942.

Q. Did you know her then, prior to September 10, 1942?

A. That was prior to September 10, yes, sir.

Q. How long had you known her prior to September 10th, 1942?

(Testimony of Rulon D. Hair.)

A. I met her that one time, that was about a month prior to September 10.

Q. Did you meet her on September 10, 1942?

A. Yes, sir.

Q. Where did she live?

A. I don't know.

Q. Do you know the town in which she was living at that time? A. Montpelier, Idaho.

Q. Where did you meet her on September 10, 1942?

A. In front of the Idaho Billiards at Montpelier.

Q. On the street? A. Yes, sir.

Q. What was the occasion of that meeting?

A. I had completed calling on the Idaho Billiards and was crossing the sidewalk to cross the street to where my car was. Mrs. Newby came down there with her small daughter, as I remember and pushing a baby carriage.

Q. What was said and by whom? Was there anyone else there at that conversation besides you and Mrs. Newby? A. Her daughter. [431]

Q. Yes, the children, but was there any other grown person? A. No, sir.

Q. What was said and by whom?

A. I didn't recognize her right at first but we spoke and she recalled having met me at the Aero Club a month previous.

Q. Did she say anything about a date?

A. Yes.

Q. What did she say about a date, at that time?

(Testimony of Rulon D. Hair.)

A. I made the remark that I was going to the Aero Club again that evening for dinner and she said, "Fine, how about going along?"

Q. What did you say?

A. I told her there were two other gentlemen going with me and I didn't know what they would think about it.

Q. And what did she say to that?

A. I don't recall what she said to that.

Q. Did she make any other comment about the evening's entertainment?

A. I told her I had reports to make out and a few other things to do and that I would see the reaction of these other fellows.

Q. What else was said, if anything?

A. I don't recall,—I don't recall that anything was at that time.

Q. Did she say anything about dancing? [432]

A. Yes, sir.

Q. What was said?

A. She said she had been up to the Club two or three nights before but hadn't had a very good time and she would like to go up with us and dance.

Q. Do you recall anything else in that conversation at that time?

A. There was a conversation but I don't recall it.

Q. Where was the Aero Club from Montpelier?

A. About five or six miles.

Q. From Montpelier?

A. Yes, up the canyon.

(Testimony of Rulon D. Hair.)

Q. And what kind of a club was it? What did they serve and so forth?

A. It was a general restaurant and a bar downstairs and private rooms upstairs.

Q. Did you say how far it was from Montpelier?

A. Yes, sir; five or six miles.

Q. Up in the mountains?

A. On the Geneva highway.

Q. Now about the conversation on the street in Montpelier, did you hear from her again later on that day?

A. Yes, sir; she called me on the phone.

Q. What time did she call you on the telephone?

A. It was somewhere between seven and nine o'clock. [433]

Q. Where were you at that time?

A. In my cabin.

Q. What cabins were they?

A. The Burgoyne cabins, in Montpelier.

Q. Had you made arrangement to stay there that night?

A. Yes, sir.

Q. Was there any arrangement to stay with anyone there?

A. Yes, sir, I had an adjoining cabin with a salesman friend.

Q. Was there a telephone in your cabin?

A. No, sir.

Q. Who called you to the telephone?

A. One of the employees of the cabins.

Q. Do you know his name?

A. I didn't know at that time.

(Testimony of Rulon D. Hair.)

Q. Do you now?

A. I think it was Perkins.

Q. Was he a young man or an old fellow?

A. A young fellow.

Q. What did you do when he told you you were wanted on the telephone?

A. I answered it.

Q. Who was on the telephone?

A. Mrs. Newby.

Q. What was that conversation?

A. She asked if we were still going to the club. I wouldn't try to relate the exact words, but she asked if we had [434] finished with the reports. I had said that we had reports to make out.

Q. What did you say to her?

A. I don't recall the exact words, but I told her that we were about through with the reports.

Q. What was said about supper?

A. I don't recall saying anything.

Q. You said in the conversation on the street that you were going to the club for supper; did you do so?

A. No, sir.

Q. What did you do?

A. We changed our plans and went to the Burgoyne Cafe and ate.

Q. Had you had supper at the time she called on the telephone?

A. I don't recall.

Q. Do you remember what was said in the telephone conversation about going to the Aero Club, —what was said on the telephone?

A. I don't recall the exact words but I told her

(Testimony of Rulon D. Hair.)

it was all right to go along with us. I forget whether I told her that we were going to eat down town or had eaten down town.

Q. Was anything said about the hour she would be picked up?

A. No specific time, but I told her to come up to the cabins; that we would probably be back from dinner at that time. If I told her about dinner, I don't recall just what the conversation was. [435]

Q. Did she say she would come up or not?

A. She said she would.

Q. Did you see her later that evening?

A. She was approaching the cabin.

Q. Walking or riding?

A. Walking, as we were coming from the cabin she was between the service station and the cabin.

Q. What was said when you got within talking distance of her?

A. I don't recall anything particular.

Q. What was done, if anything?

A. She went to the cabin and I introduced her to these two gentlemen.

Q. Did she go to your rooms? A. Yes, sir.

Q. Did she leave anything there?

A. Her hat, as it was quite large, she said it would interfere with her dancing.

Q. What did you do then?

A. Mr. Rasmussen, this other salesman and myself went to the Club.

Q. Who else? A. Mrs. Newby.

Q. How did you go? A. This Camel car.

(Testimony of Rulon D. Hair.)

Q. You knew that it was a violation of the rules of the company? A. Yes, sir.

Q. You knew that you would be fired if they knew of it? A. Yes, sir.

Q. What time did you leave for the Aero Club?

A. About nine-thirty or ten o'clock.

Q. In the evening? A. Yes, sir.

Q. What evening was that?

A. Thursday evening, September 10.

Q. The evening preceding the accident that happened the next afternoon about 4:30 P.M.

A. Yes, sir.

Q. When you went to the Aero Club, what did you do?

A. Just danced and amused ourselves the best we could.

Q. Did you eat?

A. Not that I recall; we had eaten in town.

Q. Did she have any refreshments?

A. Yes, sir.

Q. What kinds? A. Mixed drinks.

Q. Did she buy them or did you buy them?

A. I bought two and I don't recall any other she had.

Q. Did she drink them? A. Yes, sir. [437]

Q. Did you have some?

A. I drank two with her.

Q. Did she dance with other people?

A. Yes, sir.

Q. She was in the companionship of other sales-

(Testimony of Rulon D. Hair.)

A. Yes, she just mixed around.

Q. Do you know whether she was drinking with others? A. I don't know.

Q. How long did you stay there?

A. We stayed there until after the place closed; I don't know how long after.

Q. What time did it close. Did they have the twelve o'clock curfew hour in those days?

A. I am not sure but I think it was about two o'clock when they usually closed.

Q. In the morning,—two in the morning?

A. Yes, sir.

Q. Did the men who went up with you come back with you from the club? A. No, sir.

Q. How did they come back, if you know?

A. I don't remember how they came back.

Q. Did they make any comment to you about going back? A. I don't recall. [438]

Q. Why didn't you go back together?

A. I don't remember.

Q. Do you remember whether she wanted to dance more? A. No, I don't at this time.

Q. Then you left about when the place closed, about two or two-thirty in the morning?

A. We stayed a short time after they closed.

Q. All the other patrons had gone home?

A. No, there were a few people around there.

Q. After they closed what did you do?

A. Drove back to Montpelier.

Q. Were you alone with her on the way back?

A. Yes, sir, the two of us.

(Testimony of Rulon D. Hair.)

Q. On the way back to Montpelier, you and her?

A. Yes, sir.

Q. What did you do when you got to Montpelier?

A. I stopped directly across from the Burgoyne cabins.

Q. Why did you stop there?

A. She had left her hat and I asked if I should go and get it.

Q. What did she say?

A. She said why get the hat, let's go over to the Oasis Club and dance some more.

Q. Where was the Oasis Club?

A. Soda Springs.

Q. What did you say to that? [439]

A. That I had work to do the next day and I shouldn't go to Soda Springs.

Q. What did she say?

A. There was some talk back and forth.

Q. Was anything said about taking her home then,—anything said by you?

A. Yes, I mentioned taking her home when I mentioned going for her hat, and she said something about she wasn't ready to go home, and to let's go and dance some more.

Q. What else was said, if you remember?

A. I finally consented to take her to Soda Springs.

Q. That was about what time in the morning of September 11th?

(Testimony of Rulon D. Hair.)

A. I should judge around three o'clock or three-thirty.

Q. Then did you leave for Soda Springs?

A. Yes, sir.

Q. Relate what happened then?

A. Well, when we arrived in Soda Springs the Oasis Club was already closed.

Q. How fast did you drive going to Soda Springs?

A. I took my time, I don't know how fast I drove.

Q. Where was the Oasis Club with reference to the Enders Hotel in Soda Springs?

A. It is down in the next block, if they have blocks there.

Q. How far from the Enders Hotel?

A. About one city block.

Q. Did you both get out and go to the Club?

A. The club was closed?

Q. Could you see that from the truck in which you were sitting out in the street?

A. Yes, sir. The lights were out and it was closed up.

Q. Then what did you do?

A. We went to the hotel. I told her that I was exhausted and didn't feel capable of driving back and I suggested that we get some sleep.

Q. What hotel did you go to?

A. The Enders.

Q. Where did you park your car when you went to the Enders Hotel?

(Testimony of Rulon D. Hair.)

A. Close to the hotel, in front.

Q. Did the two of you go to the Enders Hotel?

A. Yes, sir.

Q. Who did you see there?

A. Just the night clerk?

Q. Who was he? A. They call him Jiggs.

Q. Was he the man who testified here yesterday?
A. Yes, sir.

Q. Charles Nichols? A. Yes, sir.

Q. Was anybody else there at that time?

A. No, not that I recall. [441]

Q. Do you remember how you registered?

A. I imagine as I usually do, I don't recall.

Q. Was she with you at that time?

A. Yes, sir.

Q. Standing by you? A. Yes, sir.

Q. Do you remember whether you registered as man and wife or just for yourself?

A. I don't remember.

Q. Did you take one room or did you take two?

A. I suggested two, but we decided that we didn't need two, we were just going to rest.

Q. Did the two of you go to the room?

A. Yes, sir.

Q. And went into the room? A. Yes, sir.

Q. That was about what time in the morning?

A. I should judge around four-thirty or five o'clock in the morning.

Q. How long did the two of you remain in that room?

A. It was around eleven-thirty or twelve o'clock.

(Testimony of Rulon D. Hair.)

Q. The next day at 11 or 12?

A. Yes, sir.

Q. That would be the same day, or the 12th of September? A. September 11th.

Q. You got to the hotel about five or five-thirty?

A. About four-thirty or five.

Q. On the 11th? A. Yes, sir.

Q. In the morning? A. Yes, sir.

Q. And you occupied that room and stayed there until about noon of that day?

A. Yes, sir.

Q. The two of you remained in that room all of that time? A. Yes, sir.

Q. There was a bed there? A. Yes, sir.

Q. Did anyone call at the room while you were there? A. Yes, they did.

Q. Who called? A. Mr. Rasmussen.

Q. About what time did he call?

A. About eleven or eleven-thirty.

Q. Did he come into the room?

A. No, sir, he didn't come into the room. He came to the door.

Q. Did you go out in the hall or did you talk to him at the door of the room?

A. I opened the door of the room and talked to him.

Q. Did he see Mrs. Newby? A. Yes, sir.

Q. What was said, if anything, between you and Mr. Rasmussen?

A. He asked when I was going home as I recall.

(Testimony of Rulon D. Hair.)

Q. Did he say anything about why you were there?

A. I don't remember anything said about that.

Q. Did he say anything about why you didn't stay at the cabin camp at Montpelier in the room that you had adjoining him?

A. He said something but I don't remember what it was.

Q. Did you say you were going to take Mrs. Newby back to Montpelier? A. Yes, sir.

Q. Did you say anything to him about sending any message to your wife?

A. He told her that I would be a little later than him in getting home?

Q. What business was Mr. Rasmussen engaged in?

A. The same business as I was only for a different company.

Q. How long did Mr. Rasmussen stay there?

A. Not very long.

Q. What time was he there?

A. Around eleven o'clock in the morning.

Q. After Mr. Rasmussen left what did you do?

A. We went down to the Oasis Club.

Q. Was it open then?

A. The Oasis Cafe and Club is a combination and we went down to have lunch. [444]

Q. And then what did you do, when you left the hotel?

A. We went into the front,—the front part is a cafe and the back is a bar and recreation room. We went into the cage and after lunch Mrs. Newby

(Testimony of Rulon D. Hair.)

suggested that we have another drink, which we did.

Q. How many drinks did you have there?

A. One that I recall.

Q. Might there have been more?

A. There could have been.

Q. What kind of drink was it?

A. A mixed drink.

Q. What do you mean by mixed drink?

A. Mixed drink,—whiskey and whatever you have as a mixer.

Q. It is an alcoholic drink? A. Yes, sir.

Q. How long did you dance there? Did you dance at that time?

A. We danced about, oh, just a little while and played the slot machines around there and visited with whoever came in until it was in the afternoon, I judge it was about two or two-thirty.

Q. What did you do then?

A. We went out and got into the car and I kind of looked up and down the street to see if Mr. Rasmussen had left town and he had and I thought I would drive to Grace and see if I could get to see him and have him tell my wife I [445] would be late getting home that night.

Q. Did you drive to Grace? A. Yes, sir.

Q. What direction is that from Soda Springs?

A. Southwest.

Q. And how far?

A. About six miles, I guess.

Q. How long were you there at Grace?

(Testimony of Rulon D. Hair.)

A. Just long enough to turn around and go back.

Q. Did you see Mr. Rasmussen?

A. No, sir.

Q. Did you transact any business for the defendants at Grace on this trip? A. No, sir.

Q. Did you transact any business for the defendants at Soda Springs? A. No, sir.

Q. Your entire attention was given to this lady?

A. Yes, sir.

Q. What did you do after you left Grace?

A. Started to Montpelier.

Q. You came back to Soda Springs?

A. Touched at the outskirts of the town.

Q. What was your objective?

A. To take Mrs. Newby home and get my baggage.

Q. And you drove to Montpelier? [446]

A. Yes, sir.

Q. Your first objective was to take Mrs. Newby home? A. Yes, sir.

Q. What kind of a day was it?

A. Cloudy and rainy.

Q. Which direction did you travel on the highway going to Montpelier, do you remember the direction? A. In a southerly direction.

Q. How far is Montpelier from Soda Springs?

A. About thirty-one miles.

Q. On your trip from Soda Springs back to Montpelier where was Mrs. Newby sitting in the truck?

(Testimony of Rulon D. Hair.)

A. In the passenger side of the car.

Q. By the side of you? A. Yes, sir.

Q. What is the fact as to whether or not she was a guest or a paying passenger?

A. She wasn't paying.

Q. She just went along with you?

A. Yes sir.

Q. At her request,—is that a fact?

A. Yes, sir.

Q. Did anything happen en route, on your way back to Montpelier, did anything happen along the road? A. There was something happened.

Q. Relate now exactly what happened,—no, I will withdraw that,—Who was driving along the highway on the way back to Montpelier, you or Mrs. Newby? A. I was driving.

Q. Relate what happened on this trip when you were taking Mrs. Newby back home?

A. I met a large green semi-trailer truck.

Q. How wide was it?

A. I didn't measure it.

Q. Could you give me an estimate?

A. They generally run seven and a half or eight feet.

Q. Where did you meet this semi-trailer truck?

A. It was about twelve miles south of Soda Springs as I recall it now.

Q. Before meeting this semi-trailer did you pass any other car going in either direction?

A. Yes, sir.

Q. Where did you pass one?

(Testimony of Rulon D. Hair.)

A. I didn't remember exactly at that time but since I have learned where I passed it.

Q. Do you know now where you passed it?

A. I know now, yes, sir.

Q. Where?

A. Just south of the overpass about two miles south of Soda Springs.

Q. How fast were you driving along the highway that day? [448]

A. About thirty-five or forty miles an hour, I would judge.

Q. When you met this semi-trailer what happened?

A. As I approached it, it was riding a little over the yellow line.

Q. That would be to the west, on your side?

A. Yes, sir, he was coming north.

Q. What happened to you?

A. To give him plenty of room I threw my two right wheels on the shoulder.

Q. How did you find the shoulder?

A. It was very soft from the rain.

Q. What happened then?

A. It threw my car out of control and it seemed that the tire blowed out. I struck a rock or a sharp object and that threw it completely out of control.

Q. What kind of highway was it at that point?

A. Smooth.

Q. Was it up and down?

A. Well, it was rolling.

(Testimony of Rulon D. Hair.)

Q. What did you do when the car went out of control?

A. I tried to control it. A panel truck like that, when it is loaded in the back end and hits a soft shoulder it causes it to swerve back and forth and I spent all the time trying to keep it on the road.

Q. How long a distance did you travel when you went out on the shoulder before the car came to a stop? [449]

A. I don't know.

Q. Did you swerve back and forth across the highway more than once?

A. I wasn't interested in counting them.

Q. Where did you,—where did the car come to to a stop?

A. On the east side of the highway.

Q. How fast were you driving when you passed this truck and up to the time it came to a stop, if you know?

A. I judge thirty-five or forty miles an hour, that is, just before I started to pass the truck.

Q. What did you do in trying to stop, when this tire incident occurred?

A. I naturally was trying to stop it but the road being as slick as it was, I was afraid to apply the brake very hard and my foot must have slipped off the brake and hit the accellerator because I felt the car lurch just before it rolled over.

Q. Was it raining at that time?

A. It was drizzling.

(Testimony of Rulon D. Hair.)

Q. What was the condition of the oiled portion of the highway, with reference to being slippery?

A. There are sections that are slippery and sections that are not, they are distinctively marked, I don't recall whether that was or not.

Q. Are you well acquainted with that road?

A. Yes, sir.

Q. Are there cross-roads from the underpass to where this accident occurred leading off the main road?

A. Yes, sir.

Q. More than one? A. Yes, sir.

Q. Do you know who was driving the semi-trailer that you passed on that day?

A. No, sir.

Q. Did you have an opportunity to get its number?

A. No, sir.

Q. Did it stop or not?

A. No, sir, he didn't.

Q. If you had been,—strike that please,—have you ever been able to find out who it was?

A. No, sir.

Q. What happened at the scene of the accident? How did the accident occur?

A. It was caused by me driving or turning out on the soft shoulder to try to avoid the truck.

Q. Your accident occurred after you passed the truck?

A. Yes, sir.

Q. How did the car come to a stop?

A. It was upside down.

Q. What did you do then? [451]

A. I got out as soon as I could.

(Testimony of Rulon D. Hair.)

Q. Up to this point Mrs. Newby had been sitting by the side of you in the truck?

A. Yes, sir.

Q. Had she made any comment or complaint touching the driving? A. No, sir.

Q. She hadn't said anything?

A. No, not about the driving.

Q. Do you remember what you were talking about, if anything? A. No, sir, I don't.

Q. Now, what was the next thing you did,—after you tipped over you say you got out of the car? A. Yes, sir.

Q. Was the horn honking at that time?

A. Yes, sir, it was.

Q. Do you remember when it commenced honking?

A. It must have commenced after the car rolled over and shorted it.

Q. Did anyone stop there? A. Yes, sir.

Q. Who was it? A. Mr. McGuire.

Q. Was he the man who testified here a few days ago? A. Yes, sir.

Q. What did you do then? [452]

A. We took Mrs. Newby in Mr. McGuire's car to the hospital at Montpelier.

Q. Then the three of you went to Montpelier?

A. Yes, sir.

Q. Then what was done?

A. Mr. McGuire went to the hospital.

Q. Mr. McGuire went to the hospital?

(Testimony of Rulon D. Hair.)

A. Yes, to find out the best way of moving her out of the car to the hospital and the doctor came down and took her to the hospital.

Q. How long did you remain at the hospital?

A. I was there about a hour as I recall.

Q. Then what did you do?

A. I went to the Chevrolet place.

Q. The Chevrolet place, what do you mean?

A. The Chevrolet garage, which is just around the corner, to try and get a wrecker.

Q. Did you get one?

A. No, sir, their's were all out.

Q. What did you do then?

A. I went to the Ford garage.

Q. What did you do at that time?

A. They had a wrecker, so we went out to the scene of the accident.

Q. Who went out? [453]

A. Mr. Oxenbine and some other fellow that was at the garage. I don't know whether he was an employee or not.

Q. The three of you went to the scene of the wreck?

A. Yes, sir.

Q. What time of the evening did you get out there?

A. I don't know for sure.

Q. Was it dark?

A. No, it wasn't dark, no, sir.

Q. Whom did you see out there, if anybody?

A. There was Sheriff Bunderson and two or three other people that I didn't know.

(Testimony of Rulon D. Hair.)

Q. What did Mr. Oxenbine do, if you remember?

A. He proceeded to get the truck in line to tow back to Montpelier.

Q. Did you ride with Mr. Oxenbine or with Sheriff Bunderson on the way back?

A. I rode back with the wrecker.

Q. Did you talk with Mr. Bunderson at the scene of the accident?

A. I talked to him, naturally.

Q. Did you talk about how the accident occurred at that time or was it later?

A. I don't recall anything being said at the scene of the accident about the accident.

Q. Did you observe Mr. Bunderson doing any measuring at that time?

A. No, sir, we were all busy picking up tobacco.

Q. How long were you there?

A. I wouldn't know, but it was long enough to upright the truck.

Q. Was it more than a few hours or not so long?

A. It wasn't very long.

Q. Then when you came back to Montpelier what did you do?

A. We took the car to the Ford garage first.

Q. Then what did you do?

A. Then I went to the Police Station to fill out an accident report.

Q. Who did you see there?

The Court: I think we will take a ten minute recess at this time.

(Testimony of Rulon D. Hair.)

11:10 A. M. March 22, 1945

Q. Who did you see at the Police Station?

A. There was Sheriff Bunderson and two other policemen if I remember right.

Q. Did you fill out an accident report at that time? A. No, sir.

Q. Did you later?

A. I filled one out the next morning.

Q. Where did you fill it out the next morning?

A. That was at the police station.

Q. Did you discuss with Mr. Bunderson, the cause of the accident? A. Yes, sir. [455]

Q. Did you explain how it happened?

A. Yes, sir.

Q. Did he ask you questions about it?

A. Yes, sir, we discussed it thoroughly.

Q. Did you fill out a report in his presence?

A. Yes, sir.

Q. I believe you said it was the next morning after the accident that you filled out the report?

A. Yes, sir.

Q. How long were you at the police station that night,—that would be Friday night the 11th of September?

A. I was there for quite a while. I wouldn't say how long.

Q. Who was there besides Mr. Bunderson the Sheriff and you?

A. Well, there was there two other officers. One kept coming in and going out, I imagine he was on

(Testimony of Rulon D. Hair.)

duty. I don't know whether he was there the entire time or not.

Q. I hand you what has been admitted as defendant's exhibit 7. Is that the report that you made out for Mr. Bunderson the Sheriff?

A. Yes, sir.

Q. Did you see Mr. Bunderson, the Sheriff, make out a report?

A. I saw him start one, but I don't recall whether I saw him finish it or not.

Q. After you made out this report, exhibit 7, what did you do with it? [456]

A. Turned it over to Mr. Bunderson.

Q. Left it with him, did you? A. Yes, sir.

Q. Had you discussed the manner or the character of the accident with him before you made out the report?

A. The night of the accident, yes sir.

Q. Then you made out the report for him the next day? A. Yes, sir.

Q. Mr. Hair, did Mr. L. R. Donnelly come to Montpelier? A. Yes, sir.

Q. When did he come up there?

A. I think it was on the 12th as I remember.

Q. Where did you first see him,—withdraw that,—you say it was on the 12th, what day of the week would that be, do you know? A. Saturday.

Q. Had you telephoned him?

A. I telephoned him Friday night, but I couldn't contact him, but I did get in contact with

(Testimony of Rulon D. Hair.)

his home, however, and I told his wife what had happened.

Q. Did you tell his wife anything about Avenel Newby? A. No, sir.

Q. You didn't mention Avenel in the telephone conversation? A. No, sir.

Q. Or anything about a guest being in the car?

A. No, sir, I didn't.

Q. When did Mr. Donnelly get to Montpelier?

A. It was the day of the 12th.

Q. Where did you meet him?

A. At the Burgoyne cabins as I remember.

Q. Were you stopping there? A. Yes, sir.

Q. Did you engage in any conversation with him in the presence of others touching this matter?

A. I could have.

Q. Do you remember whether you did or not?

A. Well, there is no question but what I did.

Q. Was there anything said about your having a guest in this car?

Mr. Davis: As to this conversation between him and Donnelly, unless it is shown that Mr. Newby was present I shall have to object. If he was present then, of course, I have no objection.

Q. Do you remember the conversation that you had with Mr. Donnelly at a time when Mr. Newby was present? A. Yes, sir.

Q. Where did that take place?

A. At the police station and at the Utah Oil Service Station on the corner by the Burgoyne cabins.

(Testimony of Rulon D. Hair.)

Q. What day was that? [458]

A. That was on Sunday.

Q. Now, Mr. Hair, had you told Mr. Donnelly up to this time that you had a guest in the car?

A. No, sir.

Q. Was anything said about it at that time and at that conversation?

A. Yes, sir, there was.

Q. What was said?

A. Well, at that conversation we discussed it and the condition of Mrs. Newby and everything in general.

Q. How did the information come out that you had a guest in the car?

A. As I remember it Mr. Russell Tuescher and his brother,—I don't recall whether there was anyone else there or not,—they drove up and informed me, as he says, that his sister was in a very serious condition, or words to that effect. At that time Mr. Donnelly walked up and I think that was the first time anything was said.

Mr. Davis: I wonder if Mr. Newby was there?

A. I don't think he was there when Mr. Donnelly first learned about the passenger. I don't think Mr. Newby was there then.

Q. When Mr. Donnelly first learned about a passenger being in the car, what was said with reference to your further employment? [459]

A. I don't recall whether there was anything said at that time or not.

Q. Were you continued in the employ of the Company?

A. No, sir.

(Testimony of Rulon D. Hair.)

Q. When were you discharged?

A. Within a half hour after he found out.

Q. After Mr. Donnelly found out?

A. Yes, sir.

Q. By whom were you discharged?

A. Mr. Donnelly.

Q. Have you worked for the Company since that time? A. No, sir.

Q. I believe you made some reports to Mr. Donnelly? A. Yes, sir.

Q. Concerning this accident? A. Yes, sir.

Q. How many did you make? A. Two.

Q. I hand you plaintiff's exhibit 10,—no that is not right, it is plaintiff's exhibit 15. Is that a report which you made? A. Yes, sir.

Q. I call your attention to that report in answer to question number 24, "which injured was in your car?"—no, I will ask you to look at question numbered 21, "Injured's name" [460] nothing appears as to that?

A. That is the way this report appears.

Q. Is there anything in that report reciting that Avenel Newby or anyone was in the car and was injured that day? A. No, sir, there isn't.

Q. When was that report made?

A. The day of the accident.

Q. When did you make another report?

A. I think I corrected it,—corrected the report and that was made out on Sunday.

Q. I now hand you plaintiff's exhibit 16 intro-

(Testimony of Rulon D. Hair.)

duced in evidence and I will ask you what that is, if you know?

A. That is the corrected report.

Q. Is there anything in that report with respect to Mrs. Newby? A. Yes, sir.

Q. What is the fact as to whether that report was made out after Mr. Donnelly learned of Mrs. Newby's being in the car?

A. I think it was.

Q. Now, Mr. Hair, in answer to question 15 on that report and also the same question,—number 15,—on the first report; “was the driver on own business or that of owner?” You wrote “owner” was that a fact? A. Not at that time, no.

Q. At the time of the accident were you on the business of the owner of the car?

A. No, sir, I wasn't.

Q. Had you been for some time, probably since you picked her up in Montpelier the night before?

A. No, sir.

Q. During the period of time from the time you picked her up on the evening of the 10th at Montpelier until the accident happened on the highway about four-thirty on the afternoon of the 11th, had you been doing any business for either of these defendants, the R. J. Reynolds Tobacco Company or L. R. Donnelly? A. No, sir.

Q. Then why did you insert the word “owner” in answer to this question? A. I don't know.

Q. Why did you not make a report touching

(Testimony of Rulon D. Hair.)

Mrs. Newby with reference to the first of these reports?

A. Because I understood from the reports that I had from the hospital that her condition was favorable and I didn't want to report it if her condition was that way.

Q. You didn't want the company to know that you had a guest with you? A. That's right.

Q. You didn't want the company to know that you were not on [462] their business at that time?

A. That's right.

Q. And you didn't want Mr. Donnelly to know that you were not on the business of the Company at that time? A. That's right.

Q. You knew that you were not doing business for the Company and that you were out on a party of your own at the time? A. Yes, sir.

Q. Now, Mr. Hart, there has been some evidence introduced about an accident which you had in April, 1939, in Pocatello, what is the fact as to whether you had any accident of any kind or character with the company car or otherwise between that date and the 11th day of September, 1942? A. No, sir, I didn't.

Q. What kind of a driving record did you have?

A. It was good so far as I know.

Q. Do you know what the National Safety Council is? A. Yes, sir.

Q. What is it?

A. It is an organization who control,—or it is

(Testimony of Rulon D. Hair.)

organized to control the safety of the general public throughout the nation.

Q. Did you ever make reports to this National Safety Council? A. No, sir, I didn't.

Q. Do you know whether reports were made by others with respect to you? [463]

A. In the event of accident, yes, sir, there would be.

Q. Did you ever receive any card or award from this association? A. Yes, sir.

Q. I meant from the National Safety Council?

A. They issue cards and emblems every year as long as you don't have an accident.

Q. Did you have any emblem or card given to you?

A. Yes, sir, I had several of them.

Q. When did you get your last one, prior to this accident in September, 1942?

A. It was in the summer of 1942.

Q. Do you have that card with you?

A. Yes, sir.

Q. Will you produce it? A. Here it is.

Q. Did you receive one in 1941?

A. Yes, sir.

Q. Do you have that with you?

A. No, sir, I haven't.

Q. I am handing you exhibit 27,—defendant's exhibit 27 and ask you if you know what it is?

A. Yes, sir.

Q. What is it?

(Testimony of Rulon D. Hair.)

A. It is a card that I received for three years without an accident. [464]

Q. From whom did you receive it?

A. The National Safety Council.

Q. When did you receive that?

A. It was in the summer of 1942.

Q. Before or after this accident in September?

A. Before.

Mr. Merrill: We offer in evidence this card as exhibit 27.

Mr. Davis: No objection.

The Court: It may be admitted.

Mr. Merrill: I will read this: "National Safety Council, Inc., Chicago, Illinois, 20 North Wacker Drive. Number 4989, Date 4-16-1942.

This is to certify that R. D. Hair has operated a commercial vehicle for R. J. Reynolds Tobacco Co., throughout three years without an accident. 45,900 miles operated. The National Safety Council's No Accident Driver Award is given in recognition of this accomplishment. R. D. McKenzie for the Company. W. H. Cameron for the National Safety Council."

Q. Do you know who R. D. McKenzie is?

A. No, sir.

Q. Whether he is a representative of the Reynolds Tobacco Company?

A. No, sir, I don't know. [465]

Q. Did you make reports to the Company touching the condition of your car and concerning the miles driven and what had been done and so forth?

(Testimony of Rulon D. Hair.)

A. Yes, sir, every day.

Q. What is the fact as to whether you received letters of commendation touching your driving situation?

A. Yes, sir, I received several of them.

Q. I hand you what has been introduced as defendants' exhibit 20 and ask you if you ever saw the original of which that purports to be a carbon copy?

A. Yes, sir, as far as I can recall.

Q. Did you receive a similar letter or letters for other years?

A. Yes, sir.

Q. What is the fact as to whether you received similar letters of commendation in 1941 and 1942?

A. Yes, sir, I did.

Mr. Merrill: That's all, you may examine.

Cross Examination

By Mr. Davis:

Q. Have you ever been convicted of a felony?

Mr. Merrill: That is objected to as being incompetent, irrelevant and immaterial, and highly prejudicial.

The Court: I will sustain the objection.

Q. Mr. Hair, how did you register at this hotel on the [466] morning of September 11th?

A. I don't recall.

Q. Why can't you recall that?

A. Well, because there was some dispute how we should register.

Q. Between who?

A. Mrs. Newby and myself.

Q. What was that dispute?

(Testimony of Rulon D. Hair.)

A. Where it should be Mr. and Mrs.

Q. She wanted you to register as Mr. and Mrs., I suppose? A. I don't recall.

Q. What was the argument about?

A. There was no argument.

Q. What did you do in that room when you took Mrs. Newby there?

A. Went up and to bed.

Q. What did you do after you got there?

A. Laid down and went to sleep.

Q. Did you lie down with Mrs. Newby?

A. Laid down together.

Q. Do you say that you had intercourse with her in that room? A. No, sir.

Q. Did you do anything with her that wasn't proper?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer. [467]

A. No, sir.

Q. Did you take off your clothes there?

A. No, sir.

Q. Did she? A. No, sir.

Q. You knew that she was married?

A. Yes, sir.

Q. You knew that she had little children?

A. Yes, sir, I did.

Q. Saw them with her the day before?

A. Yes, sir, one of them.

Q. When you saw her the day before were you on Company business?

(Testimony of Rulon D. Hair.)

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I had just finished, had just finished the company business for the day and was quitting for the day.

Q. You were coming out of a store you had called on? A. Yes, sir.

Q. When you had this lady in the car or the truck with you in or near Dubois, Clark County, Idaho, were you on company business?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer. [468]

A. Yes, sir, I was.

Q. And you had another woman in the car when you were on company business, or rather other women besides the one at Dubois?

A. My wife.

Q. Mr. Donnelly knew about that didn't he?

A. No, sir.

Q. You and Mr. Donnelly were great friends?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. As friendly as business employees can be.

Q. He went to your house and had meals with you? A. Yes, sir.

Q. Did he ever bring his wife to your house?

A. Not that I recall.

Q. You spent your vacation together?

(Testimony of Rulon D. Hair.)

A. Yes, he had his wife to my house at that time.

Q. You took your wife in the car with you up to Ponds? A. Yes, sir.

Q. You know that wasn't your wife, that it was another woman? A. No, sir, it wasn't.

Q. The time you and your wife went to Ponds was after the time you and Donnelly and Roe had this talk at the Hotel wasn't it?

A. Yes, sir. [469]

Q. At that time your wife heard these gentlemen say that if you hauled any guests or passengers that it would cost you your job?

A. Yes, sir.

Q. Do you say that your wife, when she knew it would cost you your job, still rode with you on company business? A. Yes, sir.

Mr. Merrill: I object to that as incompetent, irrelevant and immaterial.

The Court: He has answered and the answer may stand.

Q. Your wife had tried to help you get back with the company? A. No, sir.

Q. She hadn't? A. No, sir.

Q. She hadn't talked to Mr. Roe to help you get your job back? A. No, sir.

Q. And she hadn't talked to Mr. Donnelly to try to help you get your job back?

Mr. Merrill: We object to this unless it is shown that the witness was present at the conversations.

The Court: He may answer.

(Testimony of Rulon D. Hair.)

A. No, sir.

Q. Your wife knew when she rode with you that it was against company orders? [470]

Mr. Merrill: Objected to as repetition.

The Court: Sustained.

Q. Mr. Hair, you consider yourself an expert driver? A. I wouldn't say an expert.

Q. How many miles a year did you drive during the time you worked for the R. J. Reynolds Tobacco Company?

A. About seventeen thousand miles.

Q. Each year? A. Yes, sir.

Q. In that truck? A. Yes, sir.

Q. This day when you were driving the truck there was no one interfering with you?

A. No, sir.

Q. Avenel didn't interfere with you in any way?

A. No, sir, she didn't.

Q. Now, on the Exhibit 27, on the bottom is signed for the company, R. D. McKenzie. Who is that?

A. I am not acquainted with the name.

Q. That is for the R. J. Reynolds Tobacco Company? A. I don't know.

Q. You didn't send any information in?

Mr. Merrill: We object to that——

Mr. Davis: I hadn't finished the question.

Mr. Merrill: I beg your pardon. [471]

Q. You didn't send any information in that enabled you to get a card from the National Safety Council.

(Testimony of Rulon D. Hair.)

Mr. Merrill: Now we object to that unless it is limited as to who he might have sent it to.

The Court: Objection overruled.

A. Well, I don't know how they determine that. How they get the information to the National Safety Council.

Q. Who sent the information to the Safety Council, you or the R. J. Reynolds Tobacco Company.

A. I didn't, and I don't know who did.

Q. You never did send any in? A. No, sir.

Q. I call your attention to the fact that the date of this is 4-16-42, that would be the 16th of April, 1942? A. Yes, sir.

Q. It says "throughout three years without an accident." A. Yes, sir.

Q. I call your attention to the fact that within some two years and four months prior to this you had been convicted of manslaughter for killing a man while you were under the influence of liquor. Do you know whether that information was given to the National Safety Council?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. It is prejudicial and this award is given for—— [472]

The Court: ——The objection is overruled.

A. No, sir.

Q. Do you know whether the information was given to the safety council that you were arrested in Clark County while intoxicated?

Mr. Merrill: Objected to as incompetent, irrele-

(Testimony of Rulon D. Hair.)

vant and immaterial. There is no proof of such fact in this record.

The Court: Sustained.

Q. Did the safety council get the information, if you know, of the occurrence that happened in Clark County, that Sid Close testified to?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and it asks this witness to testify concerning the testimony of some other witness and it is fundamentally improper.

The Court: Sustained.

Q. Do you know if the Safety Council had the information that you were hauling guests in this car contrary to company instructions?

Mr. Merrill: Objected to as immaterial.

The Court: He may answer.

A. No, sir, I don't.

Q. What was the name of the lady that you had with you in Clark County who was one of your dealers in Idaho Falls? [473]

Mr. Merrill: Objected to as immaterial.

The Court: He may answer.

A. I don't recall her name.

Q. You did business with her in Idaho Falls?

A. Yes, sir.

Q. Sold her company products?

A. Yes, sir.

Q. And you don't recall her name. What were the names of some of these other people you hauled besides your wife?

A. Well, there was Mr. Rasmussen this one par-

(Testimony of Rulon D. Hair.)

ticular time and Mrs. Newby and Mr. Eckersley, my wife and this dealer at Idaho Falls.

Q. Can you think of anyone else now?

A. No, I think that would cover them.

Q. How many times did you haul Mr. Rasmussen?
A. There was once or twice.

Q. When was that?

A. When we went to dinner at the Aero Club on a previous trip.

Q. And you hauled this other salesman that you can't remember his name?

A. I never did learn his name. He was a new man in the territory.

Q. Who was he working for?

A. A soap company.

Q. I thought you introduced him to Mrs. Newby?
A. I did.

Q. Did you introduce him by any name? [474]

A. I suppose I did, but I don't recall the name?

Q. What does Mr. Rasmussen do?

A. He is a salesman.

A. For whom? A. Competitive company.

Q. A salesman for a competitive company?

A. Yes, sir, I think Brown and Williamson.

Q. Did he travel the same territory you did?

A. Yes, sir.

Q. Have the same customers in Soda Springs?

A. Yes, sir.

Q. He also had some customers in Grace?

A. Yes, sir.

Q. And in Montpelier?

(Testimony of Rulon D. Hair.)

A. Yes, sir.

Q. You saw him at Soda Springs about eleven o'clock on the day of the 11th of September, 1942?

A. Yes, sir.

Q. You told him to tell your wife that you would not be in until later?

A. To tell her I would not be in until after him.

Q. And you later went out to look for him?

A. Yes, sir.

Q. You had already told him what to tell your wife? [475]

A. Yes, sir.

Q. Where did you look for him in Grace?

A. On the street and I went to one of the dealers.

Q. That was one of the dealers you regularly dealt with? A. Yes, sir.

Q. Now, Mr. Hair, what were you going to do with this tobacco that you had in this truck?

A. Sell it.

Q. Who were you going to sell it to?

A. I don't just how to answer that for there are three——

Q. ——Let me ask this, who was to get the money for it when it was sold? A. I was.

Q. Who were you going to remit it to?

A. The Rino Candy Company.

Q. Who is the Rino Candy Company?

A. A jobber of ours.

Q. Jobber for the R. J. Reynolds Tobacco Company? A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. That was the way you handled the Reynolds Tobacco Company customers? A. Yes, sir.

Q. Was the truck well loaded with tobacco?

A. Yes, it generally was loaded. [476]

Q. Was it loaded at that time?

A. Yes, sir.

Q. When did you fill it up?

A. On Saturday afternoon or early Monday morning I usually did.

Q. You had been at Soda Spring on the 8th of September? A. Yes, sir.

Q. What were you doing there then?

A. Soliciting the dealers.

Q. Did you stay at Soda Springs all night on the 8th?

A. Yes, if that is the day I was there.

Q. Where did you leave this Company truck that night?

A. There in front of the hotel or in the garage. If conditions were favorable out I would leave it out.

Q. It wasn't unusual to leave this truck on the street all night while you were calling on the trade in the smaller towns?

A. I left it out but not in the larger towns.

Q. Did you leave it out in Montpelier?

A. In front of the cabin I lived at.

Q. You also carried advertising matter for the Company? A. Yes, sir.

Q. It was your duty to advertise the Company products? A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. If anybody had asked you for tobacco on the 11th of September, that is the day of the accident, you would have sold it to them, would you? [477]

A. Yes, sir.

Q. Would you have sold them tobacco if they had asked you on the 11th of September?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. Yes, I suppose I would.

Q. Was the Aero Club one of your customers?

A. Not a regular customer.

Q. Were they one of your customers, whether they were regular or not?

A. They are considered a customer.

Q. Did you call on them?

A. Not in the course of my business.

Q. These night clubs or cafes that operate at night, were these your customers in your territory?

A. Well, any place that carries tobacco is considered a customers. However, I don't call on dealers that just sell cigarettes. I wasn't interested in selling cigarettes so much.

Q. If you call on these customers and if they want any of your products you will sell them won't you?

A. Yes, sir.

Q. Whether it was at night or in the day time?

A. Yes, sir. [478]

Q. You visit customers in order to do just general work even when you didn't sell them?

A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. It was part of your business to call on them and tell them hello, whether you sold them tobacco or not?

A. Yes, sir.

Q. Who paid your expenses to come to this trial?

Mr. Merrill: Objected to as being entirely immaterial, he is under our subpoena, and of course, we will have to pay him.

The Court: I guess it has been answered now.

Q. Did anybody arrange for your room in Pocatello before you came here?

Mr. Merrill: Objected to as immaterial.

Mr. Davis: Withdraw it.

Q. How many times have you seen Mr. Donnelly since you were fired?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: I can't see the materiality of it.

Mr. Davis: Withdraw it.

Q. Are you and Mr. Donnelly good friends?

A. Yes, sir.

Q. You want to help Mr. Donnelly if you can?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.

The Court: He may answer.

A. Yes, sir, I would help him if I could.

Q. You thought that Mr. Donnelly could get you out of the scrape with the Company up until you found out that Mrs. Newby was seriously injured, didn't you?

(Testimony of Rulon D. Hair.)

Mr. Merrill: Objected to as immaterial, irrelevant and unfair in its wording.

The Court: He may answer.

A. No, sir, I didn't.

Q. You knew that Mr. Donnelly had gotten you out of trouble before?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

The Court: Sustained.

Q. Was there any sign on this car, "no guests or passengers"? A. No, sir.

Q. You signed a statement similar to the one counsel read to you which was upon receipt of the car in 1942,—you signed a similar statement in 1937?

A. Yes, sir, every time we received a car.

Q. The Company kept warning you that carrying guests was a violation of instructions? [480]

A. That was general literature they sent to everyone driving cars I imagine.

Q. The Company kept warning you not to carry guests? A. Yes, sir.

The Court: We will recess at this time until 1:30 this afternoon.

March 22, 1945, 1:30 P. M.

Cross Examination

(Continued)

Q. How old are you, Mr. Hair?

A. Thirty-two.

(Testimony of Rulon D. Hair.)

Q. How old were you in September 1942?

A. Thirty as I recall.

Q. These reports you made to the company from time to time, have you copies of them?

A. No, sir, I haven't.

Q. I will ask you if you know—Strike that please,——

Mr. Davis: May I ask counsel if they have any of the witness' reports with them here?

Mr. Merrill: No, we don't.

Q. You were warned about your driving, by the Sheriff of Clark County?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not proper cross examination.

The Court: He may answer.

A. No, sir, I wasn't. [481]

Q. Mr. Close didn't warn you about driving in his county while you were intoxicated?

A. No, sir.

Q. Were you warned by Mr. Pugmire here in Pocatello,—Mr. Pugmire was the Chief of Police?

A. No, sir.

Q. You have been over the road from Soda Springs to Montpelier a great many times have you not? A. I would average once a month.

Q. Over a period of some five or six years?

A. Yes, sir.

Q. You consider that you were thoroughly familiar with that road did you? A. Yes, sir.

Q. How far was it from where Mr. McGuire passed you to where your truck overturned?

(Testimony of Rulon D. Hair.)

A. It was about ten miles.

Q. How long after your truck overturned was it before Mr. McGuire got there?

A. I don't know.

Q. What is your best judgment?

A. I wouldn't attempt to say.

Q. Do you have any idea how long it took you to get out of the truck after it turned over?

A. Well, I was pretty well jumbled up in there. I don't [482] know just how long it took me to get out. I had a blow on the head that stunned me a little.

Q. Do you think it would be ten or fifteen minutes? A. No, not that long.

Q. How long did it take you to drive from where Mr. McGuire passed until you got to the place where the truck turned over?

A. I don't know.

Q. You know that you were going about thirty or forty miles an hour? A. Yes, sir.

Q. And it was about ten miles?

A. Yes, sir.

Q. That would be a matter of computation?

A. Yes, sir.

Q. Do you know how fast Mr. McGuire was driving? A. No, sir, I don't.

Q. Do you have any idea how far ahead of Mr. McGuire you got?

A. About ten miles ahead.

Q. How far in front. He traveled behind you in the same direction?

(Testimony of Rulon D. Hair.)

A. In the same direction, yes, sir.

Q. You were not ten miles ahead of Mr. McGuire?
A. I couldn't see him.

Q. You traveled ten miles before you turned over? [483]

A. That's what I mean.

Q. Did you look in your mirror to see if he was coming after you passed him?

A. I don't recall that I did.

Q. Then you don't know how far you pulled ahead of him when he was traveling along in the same direction you were going?

A. I couldn't tell, I pulled off and went around the side of his car.

Q. Now, Mr. Hair, this truck you say you met, how large a truck was that?

A. Just a real large semi-truck ten or eleven feet high.

Q. It wasn't a farm truck?
A. No, sir.

Q. It was a commercial vehicle?

A. Yes, sir.

Q. How many times larger than yours?

A. I couldn't say.

Q. It was many times larger was it?

A. Yes, sir.

Q. What would you estimate that would weigh?

A. About sixteen thousand.

Q. These cross-roads and side-roads you saw leading off the main highway from the time you passed Mr. McGuire. I am directing your attention to where your truck finally turned over along the

(Testimony of Rulon D. Hair.)

side of the road or highway, [484] were there any side-roads back there in a distance of one mile that went off to the side of the highway?

A. I couldn't say, but I think there was.

Q. You think there was?

A. I think there was a farm house off to the side.

Q. Is there any main traveled road that goes off that highway within a mile of where your truck turned over?

A. I wouldn't say for sure.

Q. Is there any within two miles?

A. I wouldn't know for sure.

Q. Would you know if there was any within three miles?

A. I know there are cross-roads but I don't know where they are.

Q. What is your best judgment as to how far ahead of the McGuire car you got. You don't think you got more than a mile ahead of it?

A. Ahead of what?

Q. How many miles ahead of the McGuire car do you estimate that you got before your truck tipped over?

A. I don't know.

Q. You don't think it could have been over two or three miles?

Mr. Merrill: Objected to as argumentative and it has been answered.

The Court: He may answer.

A. I don't know. [485]

(Testimony of Rulon D. Hair.)

Q. Did you tell Mr. McGuire that some truck had crowded you off the road?

A. I don't think we had any conversation about that, I don't know whether I did or not.

Q. Did you try to get out a complaint against the man that drove that truck that pushed you off the road?

A. I left that to the law enforcement officers.

Q. Did you tell the Sheriff that you would like to have that man found?

A. I did not, I figured it was his business.

Q. You were interested in knowing who it was?

A. Naturally.

Q. The shoulders along the highway were soft all the way from Soda Springs to where you tipped over?

A. Yes, sir.

Q. When you went over there from one side to the other Mr. Oxenbine couldn't see your tracks where you crossed the road, very plainly?

A. I could see them.

Q. Did you follow them? A. No, sir.

Q. Did you question the Sheriff's measurements of your tracks?

Mr. Merrill: We object to this, it is improper to measure one witness' testimony against another's.

The Court: He may answer.

A. No I don't. [486]

Q. You think they are correct?

A. They should be.

(Testimony of Rulon D. Hair.)

Mr. Merrill: I move to strike that answer as a conclusion of the witness.

The Court: It may stand.

Q. When you went out with Mr. Oxenbine did you say anything to him about some semi-trailer pushing you off the road?

A. I don't know whether I did or not.

Q. You don't remember? A. No, sir.

Q. Your tire blew out as soon as you went off the road the first time?

A. I wouldn't say that it did or didn't. It seemed to me that it blew out when I passed the truck the first time.

Q. It hit a rock?

A. That is what I surmised.

Q. You didn't go back and see if it hit a rock?

A. I was interested in the merchandise scattered over the road.

Q. Were you interested in anything other than the merchandise scattered over the road?

A. Naturally.

Q. Were you interested in this lady?

A. You bet I was.

Q. You were interested in this man that pushed you off the road? [487]

A. I wouldn't say that he pushed me off the road. There would be a clearance of about nine inches if he was on his side of the road.

Q. You considered that he was at fault?

A. Not necessarily.

(Testimony of Rulon D. Hair.)

Q. You were interested in whether you hit a rock back there or not?

A. I was interested but I didn't go back.

Q. You didn't go back?

A. I was busy picking up the tobacco.

Q. How much did your truck weigh?

A. What was that?

Q. How much did your truck weigh?

A. That would be pretty hard to say.

Q. What is your best estimate?

A. About four thousand pounds.

Q. With the load that was on it?

A. Yes, sir.

Q. Where was the load in your truck, mostly in the back end?

A. It was all situated behind the driver's compartment.

Q. What was the first thing back of the driver's seat?

A. A space for the advertising.

Q. What did you do with that advertising material out in the territory?

A. Tacked it up or made displays with it, whatever it called for. [488]

Q. Was the back end of your truck inclined to swerve and sway when the road was wet?

A. It would do that even on dry roads when the car got out of control.

Q. You think your foot slipped off the brakes and got on the gas accelerator?

A. That's the way it appeared but I wouldn't say that it happened.

(Testimony of Rulon D. Hair.)

Q. You were sober? A. Yes, sir.

Q. Is it generally uphill from Soda Springs to Montpelier? A. It is up and down.

Q. Is the elevation higher at Montpelier?

A. I wouldn't know.

Q. Would you say that it was generally up-grade?

A. Well, it is generally up-hill I think.

Q. I will ask you if it is not a fact that with that truck going thirty-five miles an hour if you took your foot off the gas at the time you first had the accident that it would practically stop within eight hundred feet?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. It is argumentative and it doesn't take into consideration the incline or the decline of the road.

The Court: He may answer. [489]

A. I don't know.

Q. Did anything happen to the tire outside of the blow-out? A. I don't know.

Q. The tire was in good shape except where it was blown out? A. I imagine it was.

Q. Didn't you testify so before?

A. I don't recall.

Q. Well, what was the condition of the tire outside of the blow-out hole?

A. It looked in good condition.

Q. You know if that tire was blown out, and if it blowed out at the time you first went off the road and you would have traveled eight hundred feet

(Testimony of Rulon D. Hair.)

with a four thousand pound load that it would tear that tire to pieces?

Mr. Merrill: Objected to as argumentative.

The Court: He may answer.

A. No, I don't know.

Q. You say that it blew out, in your opinion, when you first went off the road?

A. In my opinion.

Q. And it traveled all that distance and all it showed was a spot in the tire when you saw it at the garage?

A. Yes, sir.

Q. Did anyone else have a right to drive this truck except you?

A. Company employees. [490]

Q. Did any other company employee ever drive it after it was delivered to you?

A. Not that I recall.

Q. Who had control of this truck at all times while it was in your possession?

A. I did.

Q. Now, Mr. Hair, with reference to your exhibit number 7, all of that handwriting is yours, is it not?

A. No, not all of it.

Q. How much isn't in your handwriting?

A. Some here, I suppose the Court has put that on.

Q. What I mean is all of the handwriting?

A. The handwriting in the report, yes, except this L. R. Donnelly report, that is not mine, I didn't put it on there.

Q. You made out the report for the Sheriff in your own handwriting?

A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. He didn't tell you what to put in that?

A. No, sir.

Q. Exhibit number 27—no, exhibit 26, you received that some time in 1937, did you not?

A. Yes, sir.

Q. Now, exhibit number 19, that is your answer to the Company in reply to what you understood from the first exhibit?

A. Yes, sir. [491]

Q. That was back in 1937? A. Yes, sir.

Q. After that you did haul passengers?

A. Yes, I did.

Q. Contrary to these instructions?

A. Yes, sir.

Q. Then after you were found hauling Mr. Eckersley and your wife in the car, you agreed again not to haul any passengers? A. Yes, sir.

Q. You went right on hauling guests and passengers after that, didn't you? A. Yes, sir.

Q. Was the advertising on this truck when you got it? A. No.

Q. Who caused the advertising to be put on it?

A. That is the general policy in the states that allow advertising. The truck came out of Utah and it didn't have it on, they don't allow it.

Q. When was it put on there?

A. It was some time after the truck was delivered to me.

Q. Who had it put on? A. I did.

Q. Who had you do that?

A. I think I wrote for the form of transfers

(Testimony of Rulon D. Hair.)

and they sent them out. I requested these transfers to be sent out [492] from the factory.

Q. What do you mean by "transfers"?

A. Transfers, they are pasted on the panels, it is the advertising on the truck.

Q. Why did you put the advertising on the truck, what is it for?

Mr. Merrill: Objected to, it calls for a conclusion of the witness.

The Court: He may answer.

A. For advertising purposes.

Q. To advertise the products of the R. J. Reynolds Tobacco Company?

A. Yes, sir.

Mr. Merrill: Objected to as it calls for a conclusion of the witness.

The Court: He has answered the question and the answer may stand.

Q. It was kept on there, and it was on there at the time of the accident on September 1, 1945?

Mr. Merrill: Same objection.

The Court: Same ruling.

A. Yes, sir.

Q. You kept it there for advertising purposes?

A. Yes, sir.

Mr. Merrill: We object, that is repetition.

The Court: He has answered, it may stand.

Q. It was necessary for your wife to go with you in your truck after December 1939?

Mr. Merrill: Objected to as immaterial and it assumes a condition not shown to exist.

The Court: I think——

(Testimony of Rulon D. Hair.)

Mr. Davis: —If the Court please, I will reframe the question.

Q. After 1939, did your wife ride with you in that truck considerable? A. No, sir.

Q. Did your wife have a driver's license?

A. Yes, sir.

Q. Did you have a driver's license after your conviction in 1939? A. I did.

Q. Did you have one after your conviction in Clark County?

Mr. Merrill: Now, I object to that as prejudicial and assuming a state of facts not proven. He has asked this same thing three or four times and it is prejudicial.

The Court: You can fix a date but not a conviction. You should reframe the question.

Q. Was your license revoked after the month of July 1939, after you had seen Mr. Close up in Clark County? A. No, sir.

Q. Your license never was revoked? [494]

A. No, sir.

Q. You had it all of the time?

A. Yes, sir.

Q. Was there any notation made on your license about a conviction? A. No, sir.

Q. How did you keep that from being done?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

Mr. Davis: If there is any objection I will withdraw the question.

Q. Did you discuss with Mr. Donnelly that it

(Testimony of Rulon D. Hair.)

was likely that your license would be revoked after that conviction?

A. I don't remember anything said about it.

Q. You were fearful of that,—you and Mr. Donnelly thought if you were convicted that your license would probably be revoked didn't you?

Mr. Merrill: Objected to as calling for a conclusion of the witness and it is argumentative.

The Court: He may answer.

A. I knew if I was convicted, yes.

Q. You talked that over with Mr. Donnelly, that you might not be able to drive the truck if you were convicted?

A. We might have done.

Q. Do you say that you didn't?

A. I would not say. [495]

Q. You told Mr. Donnelly and Mrs. Hair that you picked Mrs. Newby up on the road didn't you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

The Court: He may answer.

A. I don't think so.

Q. You never told Mr. Donnelly that you picked up a passenger?

A. I told him on Sunday, but before that, no.

Q. When did you tell him that you picked up a passenger?

A. On Sunday.

Q. Where did you say that you picked up a passenger?

A. I told him just what happened as I recall.

(Testimony of Rulon D. Hair.)

Q. Did you tell your wife that you picked her up on the road?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and it is also repetition.

The Court: He may answer.

A. I told my wife the same story because my wife and Mr. Donnelly were there together.

Q. How long was it after this accident that you left the State of Idaho?

A. I don't recall for sure, probably a week.

Q. You talked it over with Mr. Donnelly.

A. What?

Q. You talked over with Mr. Donnelly moving out of the State so that you could not be sued in the State Court, didn't you? [496]

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and it is an unfair question.

The Court: I think he may answer.

A. I naturally would want to move back to where I came from.

Q. That is your answer to my question, is it?

A. That is my answer.

Q. Did you ever go back to Montpelier?

A. Yes.

Q. After you left there on Sunday after the accident?

A. Yes, I was in Montpelier after that.

Q. How long after?

A. I went through there.

Q. Did you learn when Mrs. Newby died?

A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. Did you go to the funeral?

Mr. Merrill: Objected to as immaterial and not proper cross examination.

The Court: He may answer.

A. No, I didn't.

Q. Did you ever tell Mr. Newby that you were sorry about this matter?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: In view of the objection, I will withdraw the question. [497]

Q. You knew that this truck belonged to the R. J. Reynolds Tobacco Company?

A. Yes, sir.

Q. You knew that when you signed the license application over at the Assessor's office, representing that it belonged to Mr. Donnelly? You knew that it wasn't true didn't you?

Mr. Merrill: Objected to as not proper cross examination, it is incompetent, irrelevant and immaterial.

The Court: He may answer.

A. At that time I was confused as to who the car belonged to.

Q. Now, calling your attention to exhibit number 17, you signed that at the time you received the car?

Mr. Merrill: Objected to as repetition, that has all been gone into before.

The Court: He may answer.

A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. You signed one similar to that when you took the truck that you drove prior to the driving of this one? A. Yes, sir.

Q. You still say that you were confused and didn't know who the truck belonged to at the time you bought the license? A. Yes, sir.

Q. You are confused now?

A. No, it is cleared up now.

Q. But at the time you were confused? [498]

A. Yes, sir, this (indicating) came from the Company and the title was in Donnelly.

Q. You thought it was all right to sign in the name of Mr. Donnelly whether you knew the truck belonged to him or not, did you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and improper cross examination.

The Court: He may answer.

A. I got permission to do that and obtain the license plates.

Q. You had a passenger in that truck in the year 1940 and 1941 near the State line at Freedom?

A. No, sir.

Q. Who did you have in your truck near Freedom? A. I never have been that way.

Q. How far above Montpelier have you ever been?

A. I made the circle around Montpelier.

Q. Did you have a passenger with you there?

A. No one outside of Mr. Donnelly.

(Testimony of Rulon D. Hair.)

Q. This man Rasmussen you had him a couple of times you said, I believe?

A. I think so, a couple of times.

Q. Now, Mr. Hair, have you had an opportunity to see the course of your car marked as testified to by the Sheriff and marked on the exhibit that is now on the Board here (indicating)?

A. No, sir, I haven't.

Q. Step down and examine that, please. Now that you have [499] examined the exhibit, do you know the course as shown?

A. Yes I do now.

Q. Do you make any claim now that that exhibit does not fairly represent the distance traveled by your truck,—the truck that you were driving on that date and the course of the truck after you first went off the road?

Mr. Merrill: Objected to as not proper cross examination and it is immaterial.

The Court: He may answer.

A. No, I don't claim that isn't right.

Q. And on that exhibit, or rather on the exhibit you made to your company, the report, you drew a course of travel, or a rough drawing of what you considered at the time to show the course of the car after you hit that rock?

A. Yes, sir.

Q. You know the report I have in mind?

A. Yes, sir.

Q. That is the report you mailed to the Company?

A. That was a very brief sketch.

Q. Do you say that the brief sketch was correct?

(Testimony of Rulon D. Hair.)

A. It wasn't correct so far as measurements or anything like that was concerned.

Mr. Davis: That is all.

Redirect Examination

Mr. Mr. Merrill: [500]

Q. What was the brief sketch intended for that was on the exhibit that Mr. Davis just asked you about?

A. It was to give whoever received it a general idea of what might have happened.

Q. Did you have any idea of having accuracy of measurement?

A. No, it was just as it appeared in my mind.

Q. It was intended as a rough sketch?

A. Yes, sir.

Q. You mentioned Mr. Rasmussen having been with you on two occasions. When were those occasions?

A. The night of September 10th.

Q. Immediately preceding the accident when you went up there with this woman?

A. Yes, and as I recall a couple of trips before, that we made monthly, that we had dinner at the Aero club.

Q. This other trip was up to the Aero Club there in Montpelier, was it?

A. Yes, sir.

Q. Nowhere else in the territory?

A. No, sir.

Q. No other time did you have him?

A. No, sir.

(Testimony of Rulon D. Hair.)

Q. With respect to the woman at Dubois one time in 1939, you had one woman in the car?

A. Yes, sir, I had her in 1939. [501]

Q. Was there any other time that you had this dealer? A. No, sir.

Q. Aside from Mrs. Newby on this particular night, was there any other time except the occasions you mentioned touching upon your wife, that you had a guest in the car? A. No, sir.

Q. How many times did you have your wife?

A. Two or three times.

Q. Over a period of how many years?

A. Three.

Q. That is the complete limit of all guest travel?

A. Yes, sir.

Q. Now, Mr. Hair, Mr. Davis has had shown to you a couple of exhibits, one being number 26, dated in November 1937, is that a special letter to you or a bulletin sent out to all drivers?

A. That is a bulletin to all salesmen or drivers, I suppose.

Q. How frequently did you get such bulletins?

A. Frequently, probably once a month.

Q. Now, I hand you exhibit number 19 and ask you if that is in reply to the bulletin you have in your hand? A. Well,—

Q. —Just a minute, or a subsequent bulletin that came to you, notice the date on that? [502]

A. That is what I was confused at before. It must have been a subsequent bulletin because of the fact of the dates. However it seems to correspond with answering this letter.

(Testimony of Rulon D. Hair.)

Q. Isn't it a fact that all the bulletins contained that instruction not to haul guests?

A. They are form letters.

Q. You received them frequently?

A. Yes, sir.

Q. Sometimes you answered them and sometimes you didn't?

A. Sometimes they require an answer, evidently this did not or it would say so.

Q. Only to those which required an answer you did reply? A. Yes, sir.

Q. Now Mr. Hair, you said you went into a place in Grace, Idaho, on the afternoon of the 11th of September 1942. For what purpose did you go into that place of business?

A. To inquire if Mr. Rasmussen had been in town.

Q. Did you have any other business there?

A. No, sir.

Q. Whose tobacco was in this automobile at the time of the accident. To whom did it belong?

A. It actually belonged to the Rino Wholesale Candy Company.

Q. Where are they located?

A. In Pocatello.

Q. Any sales would be reported for them and be for them? [503]

A. It would be for them but not reported to them.

Q. It would be for their credit?

A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. I think on cross examination the question was asked if you appeared on the witness stand for the purpose of helping Mr. Donnelly. You are here under subpoena are you not?

A. Yes, sir.

Q. That subpoena was served upon you?

A. Yes, sir.

Q. And you are here testifying in response to that? A. Yes, sir.

Q. What is your intention in testifying; to help someone or to tell the truth?

A. The truth as I know the facts.

Mr. Merrill: That is all.

Recross Examination

By Mr. Davis:

Q. You would not under any circumstances tell anything but the truth, would you?

A. Not if I knew it.

Q. You mean you would not if you thought you would get caught?

Mr. Merrill: That is objected to as not proper cross examination, it is an unfair question to ask any witness. [504]

The Court: He has not answered the question and I think the honors are about even here, I will sustain the objection.

Q. Where was this subpoena served on you?

A. Pocatello.

Q. You came from Salt Lake City without a subpoena? A. Yes, sir.

(Testimony of Rulon D. Hair.)

Q. You came to be subpoenaed after you got here?

(No answer.)

Q. Why did you come?

A. Mr. Black told me apparently. I agreed to come up without a subpoena.

Q. You knew that you were outside the jurisdiction of this Court and didn't have to come?

A. No, sir.

Q. Your counsel didn't tell you that?

A. No, sir.

Q. You never were served with a subpoena? That is, you never were served until you got to Pocatello?

A. No, sir.

Q. After you got to the federal building?

A. Yes, sir.

Mr. Davis: That is all.

Redirect Examination

By Mr. Merrill: [505]

Q. You were originally a defendant in this action?

A. Yes, sir.

Q. You had to come?

A. Yes.

Mr. Merrill: That is all.

Recross Examination

By Mr. Davis:

Q. I thought you said you came because you were subpoenaed?

A. I am here now because I was subpoenaed but I didn't come because I was subpoenaed.

Mr. Davis: That is all.

C. A. RASMUSSEN,

being called as a witness on the part of the defendants, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Merrill:

Q. Your name is C. A. Rasmussen?

A. Yes, sir.

Q. Where do you live? A. Pocatello.

Q. How long have you lived here?

A. A little over seven years.

Q. What is your occupation?

A. Tobacco salesman.

Q. For what company? [506]

A. Brown and Williamson.

Q. Do you know Rulon D. Hair?

A. Yes, sir.

Q. Did you know him in September 1942?

A. Yes, sir.

Q. Did you know the truck he was using at that time? A. Yes, sir.

Q. Did you see him on the evening of September 10, 1942? A. Yes, sir.

Q. Whereabouts? A. In Montpelier.

Q. Whereabouts in Montpelier?

A. We had adjoining cabins.

Q. Did you on that evening, see a lady by the name of Avenel Newby? A. Yes, sir.

Q. Where did you see her first?

A. Out by the cabin.

Q. At what time of the day or night?

(Testimony of C. A. Rasmussen.)

A. It must have been about eight or nine, it was after supper.

Q. In the evening? A. Yes, sir.

Q. With whom did she talk?

A. Talked with the three of us.

Q. Whom did she talk to first? [507]

A. Mr. Hair.

Q. What was the conversation there other than a mere introduction? A. That was all.

Q. What was done then?

A. We went back to the cabin.

Q. What was said or done there?

A. That is when we decided to go to the club.

Q. What do you mean by the club?

A. The Aero Club.

Q. Did you go? Q. We went up, yes, sir.

Q. Who went up?

A. Mr. Hair, Mrs. Newby, Mr. Higson, he was a soap salesman, I think that was his name.

Q. Did you know him?

A. That was the first time I met him.

Q. What time did you go to the Aero Club?

A. Some time between nine and ten.

Q. On the evening of the 10th of September?

A. Yes, sir.

Q. What did you do when you got up there, what was done and served generally?

A. It was a place of amusement. I talked to the proprietor.

Q. How long did you stay there?

A. Until a little before midnight. [508]

(Testimony of C. A. Rasmussen.)

Q. What did you do then?

A. The soap salesman and I came back home.

Q. Was anything said by either of you in the presence of Mrs. Newby regarding going home?

A. I think I suggested that Mr. Hair take us home, he brought us up.

Q. Did you wait for Hair and Mrs. Newby?

A. A short while.

Q. Did you come home with them?

A. No, sir.

Q. You came with someone else?

A. With someone else.

Q. Where was Mr. Hair and Mrs. Newby at the time you left that place? A. I don't know.

Q. They were still there? A. Inside.

Q. What did you do after you got home?

A. Got something to eat and went to bed.

Q. Did Hair come to the cabin that night?

A. I don't think he did.

Q. What did you do the next morning?

A. I went and knocked on his door, I expected him to go to breakfast with us.

Q. Was there any response? [509]

A. There was no response and I went in and nobody had slept in the bed.

Q. What did you do?

A. I went to work.

Q. Did you see Mr. Hair later that day?

A. Yes, sir.

Q. Where?

A. As I was through my work I noticed his car

(Testimony of C. A. Rasmussen.)

in Soda Springs and I wondered why he hadn't come back.

Q. Where was the car?

A. In front of the hotel.

Q. What hotel? A. The Enders Hotel.

Q. What did you do?

A. I went up and asked him——

Q. ——Where was he?

A. In his room.

Q. Did you go to the room? A. Yes, sir.

Q. Did you knock at the door?

A. Yes, sir.

Q. Did you see him?

H. He came to the hall.

Q. Did you see Mrs. Newby?

A. Yes, sir.

Q. Where was she? [510]

A. She was in the bed there.

Q. Did you talk to Hair? A. Yes, sir.

Q. And did Hair say anything to you?

A. Yes, sir.

Q. What did he say?

A. That he would be late getting home and please inform his wife.

Q. Was anything else said?

A. Not anything that I remember.

Q. What did you do?

A. I continued my work and came back to Pocatello.

Mr. Merrill: You may examine.

(Testimony of C. A. Rasmussen.)

Cross Examination

By Mr. Davis:

Q. How old are you? A. Forty.

Q. Are you a married man? A. Yes, sir.

Q. How many children have you?

A. Two.

Q. How old are they?

A. Fifteen and twenty-one.

Q. How long have you known Hair?

A. Shortly after I came up here.

Q. How long ago was that? [511]

A. In 1938 I think.

Q. You are still working for the same tobacco company? A. Yes, sir.

Q. You were both salesmen? A. Yes, sir.

Q. Friendly on the territory?

A. Competitors.

Q. Good friends on the territory?

A. Yes, sir.

Q. Are you good friends now?

A. Casual friends.

Q. Are you a casual friend of his now?

A. Yes, sir.

Q. Not a good friend? A. Not intimate.

Q. You like Mr. Hair? A. Yes, sir.

Q. Have a high regard for him?

A. Yes, sir.

Q. You knew on this evening before you got in the truck with Mr. Hair that he didn't have the right to haul passengers? A. Yes, sir.

(Testimony of C. A. Rasmussen.)

Q. You knew when you went with him to the Aero Club that he had no right to haul passengers?

A. Yes, sir.

Q. You didn't care about that? [512]

A. He invited me.

Mr. Merrill: We object to that as immaterial.

The Court: He has answered, it may stand.

Q. You didn't care?

A. I didn't care about it.

Q. It didn't make any difference whether you went with him contrary to instructions?

A. I didn't care.

Q. You knew as a salesman for that Company that he wasn't entitled to haul passengers?

A. Yes, sir.

Q. You knew on the evening of September 10, that he didn't have a right to haul you?

A. Yes, sir.

Q. And you didn't care anything about that?

A. I didn't care.

Q. Now, Mr. Rasmussen, did you tell his wife that he would be home late? A. Yes, sir.

Q. Did you tell her where you had seen him last? A. No.

Q. Why didn't you tell her the truth?

A. Mr. Hair asked me to tell his wife that he would be late and that is what I did.

Q. You knew why he was going to be late?

A. Yes, sir. [513]

Q. You knew that you were making misrepresentations to his wife didn't you?

(Testimony of C. A. Rasmussen.)

Mr. Merrill: Objected to as immaterial and also it is argumentative.

The Court: He may answer.

A. I knew he was going to be late if he got his work done.

Q. Will you answer the question.

Mr. Merrill: I suggest that he has answered.

The Court: The witness is now on cross examination.

A. Yes, sir.

Q. You will say that you were willing to help Hair mislead and fool his wife?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. Yes, sir.

Q. Now, what was Mrs. Newby's condition, you say she was in bed? A. Yes, sir.

Q. Undressed? A. I don't know.

Q. Were the covers over her?

A. Yes, sir.

Q. Did you hear Mr. Hair's testimony? [514]

A. Yes, sir.

Q. You say that it isn't correct, that she was just lying on the bed, do you?

Mr. Merrill: Objected to as being argumentative.

Mr. Davis: I will withdraw it.

Q. You knew Hair's truck did you?

A. Yes, sir.

Q. How could you tell it was Hair's truck?

(Testimony of C. A. Rasmussen.)

A. By the signs on it.

Q. What kind of signs?

A. Camels and Prince Albert.

Q. Had you ever seen it in the street before?

A. Yes, sir.

Q. Setting in front of the hotels in different places?

A. Yes, sir.

Q. On the street at night?

A. Yes, sir.

Q. And in the daytime?

A. Yes, sir.

Q. Where did you say you were going after you were at the hotel?

A. I told him I was going to Pocatello.

Q. You came directly to Pocatello?

A. I worked the towns in.

Q. What towns?

A. I worked Grace and Bancroft. [515]

Q. Did you tell him you were going to Grace?

A. Yes, sir.

Q. Did you tell him when you were going to Grace?

X A. I think he knew that was my route.

Q. Did you expect to find him in Soda Springs?

A. No, sir.

Q. This man Higson, where is he?

A. I don't know.

Q. Do you know where he lives?

A. No, sir.

Q. Do you know what his name is?

A. No, sir.

Q. Do you know where he lives?

A. No.

(Testimony of C. A. Rasmussen.)

Q. Did you and Mr. Hair occupy adjoining cabins? A. Yes, sir.

Q. You could walk from one bedroom to the other? A. There was an adjoining bath.

Q. You could walk from one room to the other?

A. Yes, sir.

Q. You and he customarily did that when you were out on the road? A. We had done it.

Q. How often before this?

A. Once or twice. [516]

Q. In other towns besides Montpelier?

A. I don't think so.

Q. Did you and Hair customarily go together in other towns on these trips?

A. We have been in towns together.

Q. Did you and he ever take any married woman to clubs before this time? A. No, sir.

Q. That is the only time you ever went out with one with him? A. Yes, sir.

Q. You thought it was all right to go up there?

A. It was all right for me to go with him?

Q. With Mr. Newby's wife?

A. I didn't go with her.

Q. You all four piled in the one seat of this truck to go to the Aero Club? A. Yes, sir.

Mr. Davis: That's all.

Mr. Merrill: That is all.

The Court: We will recess for ten minutes.

3:05 P. M., March 22, 1945.

Mr. Merrill: We will offer the deposition of Durwood Perkins. Mr. Smith will read the deposition.

The Court: Very well.

Mr. Smith: Is it necessary to read the [517] stipulation.

Mr. Davis: No, I will agree that it was taken pursuant to stipulation and it is agreeable with me to have the entire deposition read. I am familiar with it. You can start out with the testimony.

(Whereupon Mr. Smith read the following deposition.)

The above entitled matter came regularly on for hearing at room 506 of the Carlson Building, Pocatello, Idaho, on the 19th day of July, 1943, beginning at the hour of two o'clock P. M. of said day, for the taking of the deposition of Durwood Perkins, a witness called on behalf of the defendant R. J. Reynolds Tobacco Company and L. R. Donnelly, before R. D. Bistline, Deputy Clerk of the District Court of the County of Bannock, State of Idaho; Ben W. Davis, Esquire, of Pocatello, Idaho, appearing for the plaintiffs; and E. B. Smith, Esquire, of Boise, Idaho, and A. L. Merrill, Esquire, of Pocatello, Idaho, appearing for the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly; and Roy L. Black, Esquire, of Pocatello, Idaho, appearing for the defendant Rulon D. Hair, which deposition was taken pursuant

to stipulation for taking depositions hereto attached.

Mr. Smith: Let the record show, Mr. Reporter, that the witness Durwood Perkins is being called as a witness on behalf of the defendants R. J. Reynolds Tobacco [518] Tobacco Company and L. R. Donnelly.

DURWOOD PERKINS,

called as a witness on behalf of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Smith:

“Q. Will you state your name, please?

A. Durwood Perkins.

Q. And where do you reside, Mr. Perkins?

A. I live at Montpelier, Idaho.

Q. What is your age?

A. Eighteen years.”

Mr. Smith: Shall I read the remarks?

Mr. Davis: It isn't necessary so far as I am concerned. You can just go ahead and read the questions and answers.

“Q. Will you state whether or not you are subject to call in the military draft?

A. I will leave in the month of August, as near as I can tell now.

(Deposition of Durwood Perkins.)

Q. During the fore part of September, 1942, would you state where you worked or by whom you were employed?

A. I was employed by Joseph Burgoyne, and he owned, or had [519] leased, a service station and auto court.

Q. Where?

A. Montpelier, Idaho.

Q. As an employee of Mr. Burgoyne, would you state briefly your duties in that employment?

A. I came on work at six o'clock in the evening, and I worked from then until closing time. I watched the service station and cabins. I was there alone from nine o'clock in the evening until closing time.

Q. Now, during the fore part of September, 1942, would you state whether or not you knew, or had become acquainted with Rulon D. Hair?

A. Yes, I knew him on sight. I knew he was a Camel cigarette salesman.

Q. Where was he staying at the time you knew him, or became acquainted with him?

A. He was staying at the Burgoyne cottages. That is the auto court I work at.

Q. During the times he was staying at the Burgoyne cottages during the fore part of September, 1942, will you state whether or not you knew of some lady calling him by telephone?

A. Yes, I did. Do you want me to tell about it?

Q. No, not until I ask you. Will you now state the approximate time of day that the telephone con-

(Deposition of Durwood Perkins.)

versation came in, and who answered the telephone, what was said over [520] the phone and what you did.

Q. Well, the call came between seven and nine o'clock in the evening, and a lady called the service station and asked if I would call Mr. Hair to the phone, and I told her at that time I didn't know any Mr. Hair. She told me it was the Camel cigarette salesman, and asked me if I would call him to the phone, and I said I would, and I asked her if I should say who was calling and she said, "Just say Avenel is calling."

Q. Pursuant to that telephone call what did you do?

A. I went over and told Mr. Hair he was wanted on the telephone.

Q. Was there a telephone in the cottage in which Mr. Hair was staying? A. No, sir.

Q. Where was the telephone?

A. The telephone was in the service station.

Q. With reference to that service station, is that where you stayed most of the time?

A. Yes, sir, I stayed in the service station until I saw a car drive down to the cottages, then I went down there.

Q. When you told Mr. Hair about this telephone call, what did he do?

A. He came right over to the service station.

Q. And where were you when he came to the service station?

(Deposition of Durwood Perkins.)

A. Well, I was in there for just the first part of it.

Q. Did he answer the telephone? [521]

H. He said——

Q. (Interrupting) Just a minute, did he, or didn't he? A. Yes, sir.

Q. All right. Will you relate what you heard?

Mr. Davis: I will not urge the objection.

“Q. Mr. Smith (Continuing): When Mr. Hair answered the telephone will you state whether or not you heard him make any remark over the telephone? A. I did, yes, sir.

Q. Now, will you,—who else was preesnt there besides you and Mr. Hair, if anyone?

A. No one, to my knowledge. Once in a while there are a few people standing around in there, but——

Q. Now, will you state what you heard Mr. Hair say over the telephone?

Mr. Davis: I will withdraw, or rather not urge my objection.

“Q. Mr. Smith (Continuing): Go ahead now, and answer. A. Answer?

Q. Yes.

A. He said,—all I heard him say was, “Hello Avenel, how are you?” that is all I heard him say.

Q. Where did you go,—did you hear any more of the conversation?

A. No, I didn't. I had to leave. I was fixing a tire or [522] something out in the grease room, and I walked out of the station.

(Deposition of Durwood Perkins.)

Q. State if you know the occasion of an accident in which Mr. Hair was involved right about that time, or the next day?

A. I don't understand just what you want?

Q. Well, did you know of an accident in which Mr. Hair was involved? A. Yes, sir.

Q. About that time, or the next day?

A. The next day, yes, sir.

Q. The next day did you see Mr. Hair?

A. Yes, sir.

Q. Where?

A. He came into the station that evening after the accident. It was between ten and eleven o'clock in the evening.

Q. Between ten and eleven in the evening?

A. It was around there. I didn't pay much attention to the time.

Q. Did he make any remark to you?

A. Yes, sir.

Mr. Davis: I will waive my objection.

“Q. Mr. Smith (Continuing): When he came into the station between ten and eleven that evening, did he make any remark to you concerning any telephone calls he might receive? [523]

Mr. Davis: I will not urge that objection.

“Q. Mr. Smith (Continuing): And in such remarks did he give you, or suggest to you, any directions in case any telephone calls should come in?

Mr. Davis: I will not urge that.

“Q. Mr. Smith (Continuing): Now you can answer, Mr. Perkins. A. Answer?

(Deposition of Durwood Perkins.)

Q. Yes.

A. Well, he was expecting a phone call from Pocatello,—he come in and told me he was expecting a phone call, and told me to come and tell him, but to be diplomatic about it. That is just what he said.

Q. At that time did you know there had been an accident in which Mr. Hair and Mrs. Avenel Newby were involved?

Mr. Davis: You needn't read the remarks unless the Court wants it done.

The Court: Go ahead.

“Q. Mr. Smith (Continuing): When did you first know there had been an accident in which——

Mr. Smith: There was another interruption.

Mr. Davis: Go ahead with the questions and answers.

“Q. That there had been an accident,—the question being in the whole: When did you first know there had been an accident in which Hair and Avenel Newby were involved?

Mr. Davis: Go ahead with the answer. [524]

“A. I did know there had been an accident. Mr. Hair told me himself he had rolled his truck over; I didn't know at the time Avenel Newby was with him, but he told me himself he rolled his truck over.

Q. Is that the only way you knew it, that he told you?

A. That is the only way I knew it.

Mr. Davis: I will not urge the motion.

Q. With reference to this conversation Mr. Hair

(Deposition of Durwood Perkins.)

had with you where he told you he rolled his truck over, was that the day before or the day after the time when he had this telephone conversation where you heard him remark something about "Avenel, is this you?"

Mr. Davis: Go ahead.

"Q Mr. Smith (Continuing): You may answer.

A. State the question again.

(Whereupon the question was read aloud by the reporter.)

A. It was the day after the telephone conversation.

Mr. Smith: That is all.

Mr. Black: No questions.

Mr. Davis: That is all. I have no cross examination."

Mr. Smith: That is all of the deposition.

L. R. DONNELLY,

recalled as a witness on the part of the defendants [525] having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Merrill:

Q. State your name? A. L. R. Donnelly.

Q. You are one of the defendants in this case?

A. I am.

Testimony of L. R. Donnelly.)

Q. Where do you live?

A. Salt Lake City, Utah.

Q. How long have you lived there?

A. Seven years.

Q. What is your business or occupation?

A. Division Manager for the R. J. Reynolds Tobacco Company.

Q. How long have you been engaged in that business? A. Approximately fifteen years.

Q. Do you know Rulon D. Hair? A. I do.

Q. When did you first become acquainted with him?

A. When he first started to work for the company in 1937.

Q. Now, what was his occupation, or his duty for the company?

A. He was a salesman for the company, he called on the trade and called on jobbers, placed advertising, and we had consumer work to do.

Q. As such, during what period of time did he work for the Company?

A. He started to work in 1937. [526]

Q. How long did he continue working?

A. Until he had the accident in Montpelier, Idaho.

Q. When was he discharged?

A. September 12, 1942.

Q. Following the accident at Montpelier?

A. Yes, sir.

Q. By whom was he discharged?

A. Myself.

Testimony of L. R. Donnelly.)

Q. What are your powers with the Company as to hiring and discharging employees?

A. I have authority to discharge any employee, and I have authority to take an application but no authority to hire an employee.

Q. Did you hear of an accident in Montpelier in September 1942? A. I did.

Q. When did you get the information?

A. Early on the morning of the 12th of September.

Q. Where were you when you received the information? A. When I arrived home.

Q. At what place? A. Salt Lake City.

Q. By telephone or otherwise?

A. If I recall correctly Mr. Hair placed a call. I wasn't home and he informed my wife he had had an accident and [527] wanted to get in touch with me. When I arrived home I called Montpelier and was informed of the accident.

Q. What did you do?

A. I immediately got in my car and drove up to Montpelier.

Q. Where did you go? A. To Montpelier.

Q. When did you get to Montpelier?

A. Around noon the same day.

Q. What did you do,—first, what date did you arrive in Montpelier?

A. The 12th of September.

Q. The accident was on the afternoon of the 11th of September? A. Yes, that is correct.

Q. Who did you first see when you arrived in Montpelier? A. Mr. Hair.

Testimony of L. R. Donnelly.)

Q. Where did you find him?

A. The Burgoyne cabins.

Q. What did you do upon arrival and contact with Mr. Hair?

A. Asked him about the accident, how it happened and got his version of the accident and I got in my car and drove to the Montpelier Ford Garage to look over the wreck.

Q. At that time did he tell you there was a passenger in the car? A. He did not.

Q. When you went to the Ford Garage what did you do? [528]

A. I looked over the wrecked car, I didn't give it a complete examination. I then went to the police station and contacted the Sheriff. He had made an investigation. The Sheriff was not at the police station and the Chief of Police didn't know anything about the accident other than hearsay. I went back to the garage and made a more complete examination of the car.

Q. What did you find with respect to the car?

A. I found it completely wrecked. I would say about seventy-five per cent. The right front tire had blown out and had a three cornered gash in the center of the front right tire. The inner tube of the same tire was hanging out from the rim and it also had a six inch gash in it.

Q. After the examination of the car the second time what did you do?

A. I went from the garage to the cabins to make

Testimony of L. R. Donnelly.)

arrangements for a room that evening. Also to take the matter up further with Mr. Hair.

Q. While you were there at the filling station or the cabins did you see Mr. Hair,—strike that—while you were at the filling station or cabins did you see Mr. Newby and Mr. Tuescher?

A. While I was at the filling station Mr. Tuescher drove up and his brother drove up, I didn't know him at that time but I found out his name was Calvin, and later [529] Mr. Newby walked up.

Q. Did you have any conversation there with Mr. Russell Tuescher?

A. I was standing quite a little distance from the car being serviced and I heard Mr. Russell Tuescher remark to Mr. Hair "You are not going to leave town" and then I started to walk toward the car and I heard Mr. Russell Tuescher make the remark "The woman passenger in that car——" and I walked over then to Mr. Hair and said "My God, did you have a passenger?" That was the first I knew of it, and Mr. Hair admitted it.

Q. Was there any further conversation there at that time?

A. I asked Mr. Tuescher if he would be good enough to drive me to the hospital or the clinic where this lady was, I didn't know where it was, and he consented to drive me there. Mr. Russell Tuescher, Calvin and myself drove to the hospital.

Q. How long did you remain at the hospital?

A. Not very long. I inquired as to the condi-

Testimony of L. R. Donnelly.)

tion of the young lady and I was told and that was the extent of the visit.

Q. Did the three of you leave the hospital together?

A. As I recall now Mr. Tuescher and myself were the only ones that went to the hospital.

Q. Did you have any further conversation with either of the Tueschers at that time? [530]

A. On the road down to the hospital I asked Mr. Russell Tuescher his version of the accident and he told me.

Q. What did he say?

Mr. Davis: Was Mr. Newby there at that time?

Mr. Merrill: I don't think he was but they went into the conversation with Mr. Tuescher.

Mr. Davis: I have no objection to this witness denying the conversation.

The Court: Well, you may answer.

Q. Mr. Russell Tuescher on coming from the filling station to the hospital, I inquired as to his version of the accident and also I inquired who the lady was and he informed me it was his sister. He said that Mr. Hair and his sister had been out——

Mr. Davis: Now, just a minute. I shall object to any further conversation of this witness if Mr. Newby was not present. They did not lay the foundation by way of cross examination of Russell Tuescher. This witness cannot testify as to any conversation when Mr. Newby was not there.

Mr. Merrill: I think it was testified to.

The Court: My recollection is that Mr. Tuescher

Testimony of L. R. Donnelly.)

testified to the conversation with Mr. Donnelly and now, I understand that counsel is asking him for that conversation. [531]

Mr. Davis: It is my contention that he has a right to deny any statement of Tuescher's but if he is going on to make another statement that Mr. Tuescher is supposed to have said when Mr. Newby was not there, then the foundation has not been laid.

Mr. Merrill: When they purport to put in a conversation we have a right to put in our version of that conversation.

The Court: I will let him answer.

A. On the road to the hospital I got his version of the accident. On the way down I was informed that the lady that was in the accident was his sister and Mr. Hair had been out on a party with his sister and the car turned over and she was seriously injured.

Q. What did he say as to when she went out on the party?

A. He didn't say anything at that time, we arrived at the hospital about then.

Q. Now, who was present at the time you said you were advised by Russell Tuescher that Mr. Hair had been out with Mrs. Newby on the night of the accident?

A. I just related the conversation from the filling station to the hospital.

Q. When you got back, when you left the hos-

Testimony of L. R. Donnelly.)

pital and started toward the car was there any further conversation?

A. When Mr. Russell Tuescher and myself were leaving the [532] hospital,—the hospital was on the second floor and on the street below we came across Mr. Newby. Mr. Newby inquired of his wife's condition, whether I thought she was going to have a chance, and I informed Mr. Newby that I thought she had a fifty-fifty chance of recovery. I told Mr. Newby that it was necessary to leave town, that I had finished my investigation and there was nothing more I could do. That Mr. Hair and myself would have to get to Pocatello and check in the merchandise that was in the car and I would like his permission to leave.

Q. What was said?

A. He didn't want us to leave and I told him if it would make him feel any better I would go to the Sheriff's office and guarantee the appearance of Mr. Hair at any future date.

Q. Where?

A. At Montpelier, at the Sheriff's request.

Q. Continue with the conversation.

A. We went over to the police station and I contacted the Sheriff for the first time. I presented my card to the Sheriff and made myself known, who I was and my purpose in being there, that I wanted his permission for Mr. Hair and myself to leave town and I asked the Sheriff his version of the accident, I asked if he had been out to the scene of the accident and he said he had.

Testimony of L. R. Donnelly.)

I [533] told him that Mr. Hair had informed me as to how the accident had happened and I wanted to see if that was the case. I wanted his opinion. The Sheriff said that it appeared to him that the Tobacco Company car was going south toward Montpelier and for some reason it was crowded off the highway,—off the oil road and had gone along for some distance, and apparently it had struck some sharp object and the right front tire had blown out, and the car was then apparently thrown out of control.

Q. Was that what the Sheriff told you?

A. Yes, sir.

Q. Go ahead if there is anything further.

A. I asked the Sheriff if it was possible that this car was crowded off the highway as Mr. Hair stated and he said that it was possible that it had.

Q. Was there anything further in that conversation with the Sheriff?

A. Not that I recall now.

Q. Did you have any further conversation with the Tueschers?

A. Yes, after leaving the police station and going toward the Burgoyne cabins I had quite a conversation with Russell Tuescher who seemed to be fairly clear headed. I inquired of Mr. Tuescher if he was employed and he informed me that he was working for the railroad and [534] the conversation led back to the accident. He informed me that his sister had been over to his house on the evening of the 10th and said she had met a good

Testimony of L. R. Donnelly.)

looking tobacco salesman and she told Russell that she was going out for a good time. He said that he reprimanded his sister and tried to persuade her not to go, that it wasn't the right thing to do. He also informed me that his mother had had quite a lot of trouble with his sister——

Mr. Davis: Now, if the Court please, the last part of the statement was not testified to, there is not a word in this record about any such statement.

The Court: I don't think he touched on anything his mother told him. And I don't think you asked anything about what the mother said.

Q. Now, Mr. Donnelly, who was there at the time you were talking to Mr. Tuescher?

A. Mr. Tuescher and myself.

Q. Was there anything said further about a job or was that at some other time and some other conversation?

A. Nothing other than just like I said, I asked if he was employed and he said he was by some railroad company.

Q. Then what was said?

A. I started to say——

Q. Just a minute,—did you tell him there at that time that you were offering him a job? [535]

A. I never offered Mr. Russell Tuescher a job.

Q. Did you say that you wanted to hire him?

A. That is impossible, I haven't that authority.

Q. Did you say that? A. No, sir.

Q. Was anything said or any comment made about a lawyer or any litigation?

Testimony of L. R. Donnelly.)

A. Not at all.

Q. Did you hear Russell Tuescher's testimony touching on that? A. I did.

Q. What is the fact as to whether there was a conversation between you and Russell Tuescher or anyone else touching any form of litigation, the rights of the parties, or the supposed rights of the parties, or about lawyers or anything else?

A. There is no question about that, it wasn't even brought up.

Q. Was there anything said about corporations or about the R. J. Reynolds Tobacco Company being a strong corporation? A. No, sir.

Q. Was there anything said about shyster lawyers? A. No, sir.

Q. Any such comment made at all?

A. No, sir, not at all.

Q. Did you have any further conversation with these people?

A. Not that I remember of. [536]

Q. At that time? A. No, sir.

Q. What did you do then?

A. After getting permission from the Sheriff to leave town, I don't recall whether I had the tobacco loaded on my car before that time, if it wasn't then it was loaded at that time and we drove,—Mr. Hair and myself drove to Pocatello.

Q. During any of these conversations was there anything said about firing Hair?

A. Yes, sir, Mr. Hair was dismissed immedi-

Testimony of L. R. Donnelly.)

ately after I found out that he was carrying a passenger.

Q. When you had the conversation with Mr. Tuescher did you make any comment that he was discharged? A. I don't think I needed to.

Q. Did you make any such comment?

A. No, sir.

Q. Now did you go out to the scene of the accident?

A. I didn't at that time because the car had been hauled in to Montpelier and I contacted the Sheriff; on the way back to Pocatello Mr. Hair went in his personal car and so I didn't.

Q. Back from Montpelier to where?

A. To Pocatello.

Q. How did he get his personal car? [537]

A. His wife drove it down. I tried to find the place of the accident from the Sheriff's description but I couldn't find it.

Q. What were the restrictions on the part of the Company with respect to the use of Company trucks?

Mr. Davis: We object to this as repetition, this witness testified to all this very fully.

The Court: Yes, it is all in the record, but if Mr. Merrill wants to put it in again, I suppose he may do so.

Q. What information, if any, did you have of Mr. Hair violating any instructions of the company in regard to hauling passengers?

A. I knew of the case in Pocatello when he had

Testimony of L. R. Donnelly.)

a passenger, his wife, and a man by the name of Eckersley.

Q. When was that?

A. Some time in 1939.

Q. Was it on the same day that he had these two passengers? A. Yes, sir.

Q. What did you do with reference to that?

A. His superior officer took him to the hotel and we sat him down with his wife and explained thoroughly the conditions under which he would be permitted to continue with the company and very emphatically made it plain that he was not to haul any more guests, including his wife, in the company car at any time. I am sure that he under- [538] stood the instructions.

Q. What did you tell him you would do if he carried any guests?

A. Immediately dismiss him from the company employ.

Q. Did you know of his carrying any guests prior to that time? A. I did.

Q. Did you ever hear or have any information at all, of Mr. Hair carrying any guests from that time until the Newby case?

A. Not at all, no, sir.

Q. What was his driving record over that period of time?

A. If he had any guests in the car I couldn't have learned of it.

Q. And what if you would have learned that he had guests in the company car?

Testimony of L. R. Donnelly.)

A. I would have dismissed him immediately.

Q. How often do you get reports from salesmen? A. Every day.

Q. Now, Mr. Donnelly, did you ever hear of any incident supposed to have been in Dubois, Clark County, Idaho, prior to September 1942, where he had a guest in the car?

A. Only here in the court room.

Q. Did you ever hear of it under any other circumstances? A. I have not.

Q. Have you during the period of time that Mr. Hair was in [539] the employ of the Company—did you make trips around through the territory which he served?

A. Yes, sir, periodical trips.

Q. Periodical trips?

A. Yes, sir, I had quite a large territory to cover and I endeavored to get somewhere in his assignment once a month. Usually it was in Pocatello.

Q. During that time did you call on your dealers? A. Yes, sir.

Q. Did you hear any complaint about Mr. Hair?

A. No, sir, it was to the contrary.

Q. What did you hear?

A. That he was well liked and was doing a nice job of serving the dealers.

Q. Did you hear any complaint of any kind or character touching his method of driving an automobile? A. Not at all.

Q. Did you ever hear anything about his being

Testimony of L. R. Donnelly.)

drunk, aside from what was said in the Myers case here? A. I did not.

Q. Did you know he used intoxicants?

A. I wouldn't know.

Q. Did you ever see him when you thought he had been using them? A. I did not. [540]

Q. Did you ever have any evidence of any use of it in any contact with him? A. No, sir.

Q. Did you ever have any evidence of incompetency in the use of automobiles by Mr. Hair?

A. No, sir.

Q. What was the expense of his car in respect to the other cars driven by other drivers for the company?

A. Not out of line. When a car gets old the expense is higher.

Q. Now, Mr. Donnelly, some comment was made about a trip to Pond's resort?

Mr. Davis: I think that was gone into.

Mr. Merrill: There was an inference that there was something wrong with this trip.

Mr. Davis: I never made such an inference.

The Court: Go ahead, we will save time in clearing this up.

Q. What were the circumstances of the trip?

A. In July we have our vacation. Mr. Hair and a gentleman by the name of Hamer and his wife and myself and wife, Mr. Hair and his wife and my youngster. We drove to Ponds on a vacation trip in our personal cars, and by the way,—it was my wife and Mr. Hair's wife.

Testimony of L. R. Donnelly.)

Q. Did Hair have a car of his own?

A. Yes, sir. [541]

Q. Was it that car that was used at Pond's?

A. Yes, sir.

Q. Do you know R. D. McKenzie?

A. I know that he is an official of the R. J. Reynolds Tobacco Company. I don't know him personally.

Q. He is one of the signers of the card from the National Safety Council?

A. That is correct.

Q. That was delivered to Mr. Hair?

A. Yes, sir.

ports to the National Safety Council concerning

Cross Examination

By Mr. Davis:

Q. Mr. McKenzie is the man who made the reports to the National Safety Council concerning Mr. Hair and his activity as a driver?

A. I wouldn't know.

Q. You made trips periodically over that territory after the Myers incident in 1939?

A. That's right.

Q. On these trips you inquired of people and endeavored to find out what Mr. Hair's reputation was for driving?

A. That is correct.

Q. Did you make inquiry in Pocatello?

A. Yes, sir.

Q. Did you make inquiry in Clark County?

A. Not that I remember.

Q. Did you make any inquiry of Mr. Pugmire, the Chief of Police in Pocatello?

Testimony of L. R. Donnelly.)

A. I could have.

Q. You could have made inquiry of Mr. Pugmire after the Myers incident in 1939?

A. I didn't.

Q. I thought you said you could have?

A. But you didn't ask as to any dates before.

Q. Did you make any inquiry over a period of years?

A. I possibly have, not only this salesman but others.

Q. Did you make inquiry about this salesman over a period of years in which he worked for you?

Q. Any of those inquiries were after April 1939?

A. I wouldn't remember.

Q. Any of those inquiries were after April 1939? That is, if there were any inquiries?

A. Possibly before or after.

Q. You would not have occasion to make any prior to 1939?

A. Yes, sir, we constantly try to keep in touch.

Q. You constantly try to find out what their reputation as drivers is? A. That is correct.

Q. You did that in this case?

A. Yes, I do in every case.

Q. You took issue with the police over whether or not your [543] driver was intoxicated in 1939?

Mr. Merrill: This matter was gone into in their part of the case.

The Court: Yes, that is true, but I think I allowed you to go into matters that had been covered.

Mr. Davis: I will withdraw that.

Q. Mr. Donnelly, after Mr. Hair's conviction in

Testimony of L. R. Donnelly.)

Pocatello did you ever on your trips back here inquire of Mr. Pugmire as to how Mr. Hair was doing and what his reputation was?

A. I inquired but I don't know that I inquired of Mr. Pugmire.

Q. You inquired of the officers?

A. Possibly I did.

Q. You found nothing derogatory about his reputation? A. I don't remember that I did.

Q. You would remember it if you had been given any such information? A. I think so.

Q. You would have dismissed him if you had found any such information?

A. I would have dismissed him.

Mr. Davis: That's all.

Mr. Merrill: That is all. I think we rest at this time. [544]

The Court: Do you have any rebuttal.

Mr. Davis: Just a few questions.

MR. GEORGE NEWBY,

being recalled in rebuttal, as a witness on the part of the plaintiffs, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Newby, I am calling your attention to the testimony of Mr. Jack Perkins, the manager of the apartment house. A. Yes, sir.

(Testimony of George Newby.)

Q. Testimony was given that a notice was served upon you to vacate? A. Yes, sir.

Q. Did he advise you of the reasons for the service of the notice? A. Yes, sir.

Q. What did he say?

Mr. Merrill: We object to that as incompetent, irrelevant and immaterial, and it is not the best evidence.

The Court: He may answer.

A. I asked why he wanted us to vacate and he said that Russell Tuescher's kids and my kids got to playing in the hall and there were railroad men living there that had to sleep in the daytime because they worked at [545] night and they made too much noise.

Mr. Davis: That's all.

Mr. Merrill: No questions.

The Court: We had a witness here who was compelled to leave the city and counsel stipulated that he might be put on the stand and sworn and his testimony taken and at this time the Reporter might read that testimony to you ladies and gentlemen of the jury, and if you will listen the Court Reporter will read that testimony to the jury.

(Whereupon the following testimony was read by the Reporter.)

F. M. WILLIAMS

being called as witness in rebuttal on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. F. M. Williams.

Q. Where do you live?

A. Montpelier, Idaho.

Q. How long have you lived there?

A. Twenty-nine years next May. [546]

Q. Mr. Williams, are you well acquainted in your community? A. Yes, sir.

Q. What is your business? A. Merchant.

Q. Do you hold any official position or act in any official capacity at the present time?

A. What do you mean?

Q. Are you a member of the State Legislature?

A. I am a senator in the State Legislature.

Q. Had you known Avenal Newby in her lifetime? A. Yes, sir.

Q. How long prior to her death had you known her?

A. Ever since she was a child, twenty years or more.

Q. Are you related to the Tueschers or to Mr. Newby? A. No, sir.

Q. Were you well acquainted with her in the community in which she and you resided?

(Testimony of F. M. Williams.)

A. Yes, sir.

Q. I will ask you if you knew her general reputation as to being a person of good moral character?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and no proper foundation is laid.

The Court: He may answer.

A. Yes, sir. [547]

Q. What was that reputation, good or bad.

Mr. Merrill: The same objection.

The Court: He may answer.

A. Good so far as I know.

Q. Did you know her general reputation as to her general character? A. Yes, sir.

Q. Was it good or bad?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and no proper foundation has been laid.

The Court: He may answer.

A. Good as far as I know.

Mr. Davis: That is all.

Cross Examination

By Mr. Merrill:

Q. You have lived in Montpelier for some time?

A. Yes, sir.

Q. You mean by your testimony that you haven't heard anything said, you haven't heard her character discussed? A. No, sir, I haven't.

(Testimony of F. M. Williams.)

Q. You haven't heard her character for chastity or morality discussed by anybody?

A. No, I don't think so.

Q. You haven't heard her general character discussed by anyone in the community? [548]

A. No.

Q. You just know that she was a lady living there and you hadn't heard anything about her?

A. No, I hadn't.

Q. That is the entire substance of your testimony? A. Yes, sir.

Mr. Merrill: That's all.

Mr. Davis: That is our case.

Mr. Merrill: Now I move that the entire testimony of the witness be stricken upon the ground and for the reason that there is no foundation of any kind or character shown upon which any conclusion given by the witness could be predicated.

The Court: My understanding in matters of this kind is that when a witness is asked as to the reputation of a person, then counsel has a right to examine as to his qualifications to answer, but that when he has been asked and answers, and then counsel cross-examines, and the witness may give statements that seem contrary or to indicate that he was not familiar with the reputation about which he testifies, then it becomes a question of the weight of the testimony and that is for the jury. However, I will reserve my ruling on the motion to strike at this time.

Mr. Merrill: We made some motions at the conclusion of the plaintiffs' case.

The Court: I understand that both sides rest.

Mr. Merrill: Defendants have rested.

Mr. Davis: And so have the plaintiffs.

Mr. Merrill: There were some motions made at the conclusion of the plaintiffs' evidence so far as I know they were not ruled upon.

The Court: No. I thought you were in a hurry to get on with the case.

Mr. Merrill: Yes, I understand. And now these matters are in a measure a restatement of those motions with one or two other matters:

Comes now the defendants Donnelly and the Reynolds Tobacco Company and move the Court for a directed verdict in favor of the defendants upon the grounds and for the reasons that the evidence is insufficient in law to justify the submission of this cause to the jury, and more particularly as follows, to-wit:

That the evidence shows without substantial conflict that at the time the accident occurred and for approximately eighteen hours theretofore that the said Rulon D. Hair was not acting as the agent of said defendants or either of them, and was not within the scope of his employment, nor doing anything within his scope to further the business of his master but was entirely upon a pleasure party of his own and at the time of the accident he was transporting the deceased Avenel Newby with him as a [550] guest to her home in Montpelier, Idaho.

2. That the evidence conclusively shows that Avenel Newby was riding in the automobile as a

guest of Rulon D. Hair, which automobile was owned by the R. J. Reynolds Tobacco Company and the said Rulon D. Hair had no authority of any kind or character from either the said R. J. Reynolds Tobacco Company or L. R. Donnelly, to haul guests in the said car but had positive oral and written instructions that under no circumstances was he permitted to haul guests in the said car, and that no one should be transported by him in such car other than an employee or officer of the company, and that this automobile was used in violation of these instructions and that the evidence is wholly and completely insufficient in law to show any waiver of these instructions on the part of either said L. R. Donnelly, or the R. J. Reynolds Tobacco Company.

3. That the evidence fails to show that at the time of the said accident Rulon D. Hair was in anywise guilty of violating the guest statute of the State of Idaho, or that he was guilty of reckless disregard of the rights of Avenel Newby, or of any violation of any other of the requirements stated in said statute providing for recovery of the guest suffering damage, and that he was not guilty of any such negligence required by the guest [551] statute at the time of the said accident.

4. That the evidence wholly and completely fails to show that the said Rulon D. Hair was a careless, reckless, drunken and incompetent driver or that he was habitually negligent and that the one accident which may have occurred in Pocatello in 1939 is wholly and completely insufficient as a

matter of law, to establish the status of incompetency on the part of the driver.

Further the said defendants move that in the event that the motion of nonsuit be denied, that the—strike that, please—The defendants move that in the event the motion of nonsuit be denied then the defendants urge that their motion for directed verdict be granted upon the question raised by their motion regarding paragraph number seven of the amended complaint wherein it is charged or attempted to be charged that the said Rulon D. Hair was permitted to use the truck of the defendants when it is alleged that they knew him to be a careless, reckless, drunken and incompetent driver and attempted to charge negligence upon the part of these defendants in such manner; upon the ground and for the reason that the evidence is wholly and completely insufficient and wholly and completely fails to show as a matter of law that there is any incompetence or negligence shown in the use of automobiles as an habitual matter but that [552] said allegations are in nowise supported or proved by the evidence and that if any such existed, no such evidence of any such status ever came to the knowledge of the defendants or either of them.

It is further moved that if this motion be granted then that all that proof of the said proceedings in this case be removed from the jury by proper instructions and that the evidence attempting to bear thereon be stricken from the record.

May I add to the first motion that the evidence

wholly and completely fails to show that at the time of the accident when Avenel Newby was a guest in said automobile that the said Rulon D. Hair was acting within the scope of his employment but on the contrary the evidence conclusively shows that he was not so acting.

There are other matters I have attempted to raise by instructions I have handed to Your Honor as to the statutes and the defense here. These matters are sufficiently presented, I assume.

Mr. Davis: Comes now the plaintiffs and request the Court to instruct the jury to return a verdict for the plaintiffs in conformance with the prayer of the complaint.

The Court: I am satisfied that this case should be submitted to the jury except as to the amended part of the complaint, without any reference to the [553] former judgment as to Hair, but I am inclined to think that the one allegation as to the employment of Mr. Hair knowing him to be a reckless, drunken and incompetent driver should not be submitted to the jury. That is my impression now, and I would like to hear counsel on that point. I will hear you in the morning on that matter.

We will recess until 10 A. M.

10 A. M. March 23, 1945.

The Court: The record may show that the motion to strike the testimony of Mr. Pugmire is denied and also that the motion to strike the testimony of the witness F. M. Williams is denied.

(Argument of counsel heard by Court on Motions.)

The Court: I think, under the rules, I will withhold ruling on the motions at this time and submit the matter to the jury, and it can all be raised again, or the Court can consider it further.

I think we will adjourn now until two this afternoon and at that time I will ask the Bailiffs to have the jury back for their instructions.

2 P. M. March 23, 1945.

The Court: The record may show that the motions for nonsuit and motion for directed verdict on the part of plaintiff and defendants are denied.

(Arguments to the Jury.)

INSTRUCTIONS

The Court: Ladies and Gentlemen of the Jury: You have listened intently to the evidence and the argument of counsel in this case, and if I may have your attention for a short time I will advise you as to the principles of law applicable in this matter, by which you must be guided in your deliberations. It is your duty to accept these instructions as correct and so far as the law in the case is concerned to be guided by the Court's instructions. The law provides an ample and adequate remedy whereby any mistake in the instructions may be corrected but it is not the province of the jury to undertake to correct the mistakes of law which the Court may make, and for the purpose of

your deliberations the instructions must be accepted as the law of the case.

The issues in this case are made up by the amended complaint of the plaintiffs and the answer of the defendants. These issues have been explained to you quite fully by counsel for the respective parties during the trial and the arguments made to you, and you will be permitted to take the pleadings to the jury room with you so I do not think it necessary to say anything further to you in regard to them, except that you may refer to them for any assistance they may be to you during your deliberations. I will also say that you must not consider them as evidence in any sense, they are merely to advise you of the claims made by the respective parties. [555]

In passing upon the issues in this case the burden is upon him who asserts the existence of a fact to establish it, and in civil actions of this character to establish it by a preponderance of the evidence. The burden therefore is upon the plaintiff in the first instance to show by a preponderance of the evidence the cause of action set forth in his complaint, and in determining the credibility to be given to the testimony of any witness you have the right to take into consideration his interest, if any, in the result of the case, his demeanor on the witness stand, his candor or lack of candor, and all other facts and circumstances which would influence you in determining whether or not a witness had told the truth. Preponderance of the evidence does not necessarily mean the greater number of

witnesses. It means the greater weight of the testimony or evidence before you taken as a whole. This is the meaning of preponderance as accepted in the law.

It is your duty, Ladies and Gentlemen, to follow these instructions in good faith, and to try to apply them to the evidence fairly and impartially, entirely apart from any consideration except the facts in the case; and conscientiously and impartially render a verdict. The fact that one party is a corporation and the other a natural person you must disregard, for both are equal before the law.

You are the sole judges of the facts and you must determine what the facts are from the evidence introduced and from the circumstances which have been introduced and detailed by the witnesses. That being your responsibility, it is also your right and duty to determine and to pass upon the credibility of the witnesses and the weight to be given to their testimony. You will consider the interest which the witnesses have in the result of the trial, and all other facts and circumstances which in common experience of life you have learned, bear upon human testimony and tend to make it truthful and reliable, or upon the other hand, tend to distort or color it.

You are instructed, that in the title of this case and elsewhere in the pleadings, Rulon D. Hair appears as a defendant against whom judgment is sought by the plaintiffs, along with the other defendants, yet the Court advises you that your consideration in this matter is as to the controversy

between the plaintiffs and the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, and any impression you may have received from any facts called to your attention in regard to any former trial of this action should be totally ignored by you, and you should not allow it to enter into your deliberations in any way. [557]

You are instructed that if you believe that R. D. Hair, who has been mentioned many times during the trial of this case as the driver of the truck, was a careless, reckless, drunken, incompetent driver, and that the defendants R. J. Reynolds Tobacco Company, and L. R. Donnelly knew, or by the use of reasonable diligence could have known that he was a careless, reckless and incompetent driver, or that he was acting as the agent, servant or employee of the R. J. Reynolds Tobacco Company or L. R. Donnelly, within the course and scope of his employment as these terms are defined for you in these instructions, then you would be justified in finding against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly.

You are instructed that one driving an automobile owned by another is presumed to be the agent of the owner of said automobile.

You are instructed that Section 48-908 Idaho Code annotated as amended by Chapter 160 of the Idaho Session Law of 1939 provides as follows:

“Liability of Motor Owner to Guest.—No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against

such owner or operator for [558] injuries, death or loss in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others."

In this case it is alleged by the plaintiffs and admitted by the defendants that Avenel Newby was riding in the automobile being driven by Rulon D. Hair as a gratuitous guest and accordingly, the statute quoted to you has full application to the facts in this case.

You are instructed that the plaintiffs have alleged that the defendants were negligent in permitting Rulon D. Hair to use said automobile knowing him to be a reckless, drunken and incompetent driver. Before you can consider this charge against the said defendants it would be necessary for you to find from a preponderance of the evidence, first; that Rulon D. Hair was a careless, reckless, drunken and incompetent driver on the date of the accident, and, secondly; that such facts were known to the defendants, and before such matter can be considered by you it would be necessary for you to find that a reasonably prudent man, knowing the facts as shown by the evidence would reasonably conclude that he was of such character. In order that prior specific acts of negligence by a servant, agent, or employee should be sufficient to establish the master's negligence in retaining the [559] servant in his employ, the action must be the result of such incompetence of such a character rendering the servant unfit to be retained in his

position, and even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless, drunken and incompetent driver, yet, if such was not known, or by reasonable diligence could not have been known to the defendants they could not, nor either of them be held negligent in employing Rulon D. Hair or keeping him in their employment.

The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that statute it is provided that it shall be prima facie lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is [560] further provided in the State statute that it shall be prima facie unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities.

You are instructed that a servant may be pre-

sumed prima facie to be acting in the course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged injury occurred, it was being used under conditions which normally attended those used in connection with the master's business.

You are further instructed that when Hair took possession of the panel truck it was with the definite agreement that he would not haul guests in said automobile. It is admitted that Avenel Newby was a guest. If, under such circumstances Hair did haul a guest in the car he would be acting outside the scope of his employment and his employers could not be liable for any injury that may have occurred to said guest. However, you are also instructed that if you should find from the evidence that the said Rulon D. Hair had previously to the 11th day of September 1942 disobeyed the instructions of his employer or employers and had permitted guests to ride with him in the truck or trucks furnished him by the R. J. Reynolds Tobacco Company for the purpose of selling their products and that such fact or facts were known to the [561] R. J. Reynolds Tobacco Company or any of its authorized agents or if by the use of ordinary diligence and precaution such facts could have been known to the said R. J. Reynolds Tobacco Company or any of its agents, then the said defendants in this case could not avail themselves of the defense that the said Rulon D. Hair was

acting contrary to instructions and outside the scope of his authority in hauling a guest.

You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenel Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenel Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenel Newby, then your verdict should be for the plaintiffs, if you find for the plaintiffs upon the other issues.

You are instructed that it has been admitted that L. R. Donnelly was the division manager of the defendant R. J. Reynolds Tobacco Company, and that Rulon D. Hair was under the direction and supervision of L. R. Donnelly as Division manager, and you are instructed that any notice to [562] L. R. Donnelly or any facts that came to his attention would constitute notice to R. J. Reynolds Tobacco Company, as he was their duly authorized division manager and agent.

You are further instructed, that Rulon D. Hair cannot be charged with a reputation of drunken and reckless driving an automobile, unless you find that such a reputation was generally known among the populace of the community in which he lived and worked, in addition to the opinion in that regard of a relatively small class of per-

sons, and that the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly cannot be charged with having known any such reputation of Hair unless it be shown that any such reputation was known to the defendants or either of them, or that Hair's acts of drunken or reckless driving, if any, were so flagrant, and committed so frequently and publicly that the defendants in the exercise of reasonable diligence should have known of any such reputation of Rulon D. Hair; further an opinion of a small group of persons, if you believe such opinion existed, cannot be reasonably expected to give notice of such fact to an ordinary business man, nor be sufficient to create a reputation.

You are instructed that an employer in selecting an employee, must exercise a degree of care commensurate with the nature and danger of the business in which the [563] employee is engaged.

You are instructed that it is alleged by the plaintiffs that the defendants Donnelly and Reynolds Tobacco Company intrusted the panel truck to Hair, knowing that Hair was a careless, reckless, drunken and incompetent driver and you are instructed that if you find said allegations to have been proven and if you are satisfied by a preponderance of the evidence that said Rulon D. Hair was a careless, reckless, drunken and incompetent driver and that such fact was known by his employer or employers and the owner of said truck; then his employer and owner of said panel truck would be liable for the acts of said Hair, in reckless disregard of the

rights of others, regardless of whether he was acting within the scope of his authority or on his master's or employer's business.

You are instructed that it is conceded that the panel truck belonged to the R. J. Reynolds Tobacco Company and the facts show that the accident occurred during the ordinary business hours; that the accident also occurred in the territory or locality in which the said Rulon D. Hair was authorized to operate as a salesman for R. J. Reynolds Tobacco Company products and that the said panel truck belonging to the R. J. Reynolds Tobacco Company and driven by Rulon D. Hair at the time of the accident, contained property [564] and products of the R. J. Reynolds Tobacco Company and had advertising matter therein of said Company, carried for sale and advertisement by the said Rulon D. Hair in said panel truck, and you are instructed that you may take into consideration these facts and circumstances to assist you in determining whether or not the said Rulon D. Hair was at the time of the accident acting within the scope of his employment.

In this case it is contended that Rulon D. Hair drove and operated the automobile with reckless disregard to the rights of Avenel Newby. The phrase or term "reckless disregard" as used in the guest statute quoted to you means an act destitute of heed or concern for consequences; especially foolishly heedless of danger, headlong, rash; without thought or care for consequences.

You are instructed that there is a presumption

that the driver of an automobile is the owner's agent, but this presumption is rebuttable. Thus, if you should find in this case that the said Rulon D. Hair, at the time of the accident was using an automobile which was owned by the R. J. Reynolds Tobacco Company and L. R. Donnelly, but that the use thereof was not in the furtherance of the business of either of the defendants, but was being used by the said [565] Rulon D. Hair for his own personal business or pleasure, then and in that event the said defendants would not be liable for any damage caused by the use of the said automobile by the said Rulon D. Hair.

You are instructed, that there has been evidence introduced in this cause touching an action in which Rulon D. Hair was involved in Pocatello, Idaho, in April, 1939, and certain litigation which resulted from that accident. The only purpose for which such evidence was admitted was upon the question of whether or not the R. J. Reynolds Tobacco Company and L. R. Donnelly knew of said action and whether or not such knowledge, if they had it, could be considered as a waiver of their instructions against Hair hauling guests and you should not consider any of this evidence as bearing upon any of the other issues in this case.

The depositions read to you in this case are the testimony of witnesses who were unable to attend the trial of this case, and were taken in the manner provided by law and under oath, the testimony of such witness as contained in such depositions is entitled to the same consideration and weight as

though the witness was present in person and testifying orally in the Court room. [566]

You are instructed that the plaintiffs in this case cannot recover against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, or either of them, unless you believe from the evidence and from these instructions that Avenel Newby, deceased, could have recovered against both or either of said defendants had she not been killed, but only injured. In other words, the rights of these plaintiffs are no greater than the rights of Avenel Newby would have been had she survived the accident.

You are not bound by the testimony of any witness as to any matter except as such appeals to your judgment and common sense and you are entitled to view it and to interpret it in the light of your experience, good judgment and common sense.

I think I should tell you also, that you should not single out any particular statement I may have made in giving you these instructions, but they should be considered as a whole,—as an entire charge.

You have already been advised or will observe that this action is one on behalf of George H. Newby, the husband of Avenel Newby, deceased, in his own behalf, and also on behalf of Richard Arlen Newby and Patty Ann Newby, both minors, and children of the deceased. Avenell Newby, who are [567] represented by their guardian ad litem, their father, George H. Newby, and you are instructed that if you find that the plaintiffs are entitled to

damages, and if you return a verdict in favor of the plaintiffs, that your verdict should be in a lump sum and that any amount, if allowed, will be apportioned to the father and the minors by the Court in such manner or such amounts as to the Court seems proper.

Now, Ladies and Gentlemen, if you find in favor of the plaintiffs and come to consider the damages which you will award, there is no precise measure or guide. The question is necessarily committed to the good sense of twelve persons such as you are, acting as jurors. Any damage allowed should be such, as under all the circumstances of the case will be just. In considering the amount, however, you may take into consideration the age and condition of the deceased Avenel Newby.

You are permitted to take into consideration such loss of companionship and society, if any, which the plaintiffs might have enjoyed. You may also consider such future earnings of the deceased, if any, which might have been received by the plaintiffs. You may also consider the amount that the plaintiffs have necessarily paid out or incurred by reason of the expense of physicians, hospital and funeral expense. [568]

You are to consider this question as you consider other questions in the case, dispassionately and fairly, with the purpose in good faith to award such reasonable damages as the plaintiffs have suffered. The amount of damages, if any, which you allow shall in no event exceed the amount prayed for in the plaintiffs' complaint.

However, in a case of this kind damages cannot be allowed for grief and mental suffering of the plaintiffs which may have been occasioned by the death of Avenell Newby.

You have heard the witnesses, seen the exhibits, listened to the arguments of counsel and the instructions of the Court, you may take with you, when you retire, the exhibits which have been admitted and you may refer to them for such assistance as they may give. You should not consider any evidence offered by either side and rejected by the Court, nor should you consider any evidence ordered stricken from the record.

And finally, I think I should also say to you that you should not, in arriving at a verdict, if you conclude that damages should be awarded, add together the several different amounts representing the respective views of jurors and then divide the total by twelve or by some other figure intended to represent the number of jurors or ideas represented. This would be a quotient verdict and [569] of course, would be contrary to your oath. You are, of course, to give serious consideration to each other's view and reasoning, in an honest endeavor to reach a common agreement, but such agreement is to be based upon the final beliefs of the jurors and should not be arrived at by that mechanical device of addition and division which constitute a quotient verdict.

In this Court it is necessary that all jurors concur in finding a verdict, even in a civil case of this character. Forms of verdicts have been prepared

for you and you will have no difficulty in using them. If you find for the plaintiffs and against the defendants, you will use the verdict prepared for that purpose filling in the blank space left in the verdict to indicate the amount of damages you find the plaintiffs are entitled to. If you find for the defendants and against the plaintiffs, then you will use the verdict prepared for that purpose in which there is no blank space left.

By way of further explanation of the verdicts that it is your province to return, you may return a joint verdict if you so desire; that is, you may find in favor of the plaintiffs and assess damages against both the defendants jointly, or you may find in favor of both the defendants and against the plaintiffs, or you may find for the plaintiffs and assess the damages against either [570] defendant separately,—you may find in favor of the plaintiffs and against one of the defendants, and in favor of one of the defendants and against the plaintiffs.

When you retire to your jury room you may elect one of your number as foreman, and when you arrive at a verdict your foreman alone need sign the verdict and it will then be returned into open Court.

After the Bailiffs are sworn, you will retire to consider your verdict.

(After consultation of Counsel and Court at the Bench, the following instruction was given:)

Ladies and Gentlemen, so that there will be no misunderstanding: If your verdict is in favor of

the plaintiffs, you could find against the defendants jointly or you could find against one defendant and not against the other defendant. However, you cannot apportion the verdict between the two defendants. The verdict must be against both jointly or against one.

Mr. Merrill: Comes now the defendants L. R. Donnelly and R. J. Reynolds Tobacco Company before the jury has retired and objects and excepts to these certain instructions given by the Court more particularly as follows: "You are instructed that if you believe that R. D. Hair who has been mentioned many times during the trial of this case as the [571] driver of the truck, was a careless, reckless, drunken, incompetent driver, and that the defendant R. J. Reynolds Tobacco Company, and L. R. Donnelly knew, or by the use of reasonable diligence could have known that he was a careless, reckless and incompetent driver, or, that he was acting as the agent, servant or employee of the R. J. Reynolds Tobacco Company or L. R. Donnelly, within the course and scope of his employment as these terms are defined for you in these instructions, then you would be justified in finding against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly."

"You are instructed that the plaintiffs have alleged that the defendants were negligent in permitting Rulon D. Hair to use said automobile, knowing him to be a reckless, drunken and incompetent driver. Before you can consider this charge against the said defendants it would be necessary for you

to find from a preponderance of the evidence, first, that Rulon D. Hair was a careless, reckless, drunken and incompetent driver; and on the date of the accident, and secondly; that such facts were known to the defendants, and before such matter can be considered by you it would be necessary for you to find that a reasonably prudent man, knowing the facts as shown by the evidence would reasonably conclude that he was of such character. In order that prior specific acts of negligence by a servant, agent, or employee should be sufficient to establish the master's negligence [572] in retaining the servant in his employ, the action must be the result of such incompetence of such a character rendering the servant unfit to be retained in his position, and even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless, drunken and incompetent driver, yet, if such was not known, or by reasonable diligence could not have been known to the defendant they could not, nor either of them be held negligent in employing Rulon D. Hair or keeping him in their employment," and

"You are further instructed, that Rulon D. Hair cannot be charged with a reputation of drunken and reckless driving an automobile, unless you find that such a reputation was generally known among the populace in the community in which he lived and worked, in addition to the opinion in that regard of a relatively small class of persons, and that the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly cannot be charged with having

known any such reputation of Hair, unless it be shown that any such reputation was known to the defendants or either of them, or that Hair's acts of drunken or reckless driving, if any, were so flagrant, and committed so frequently and publicly that the defendants in the exercise of reasonable diligence should have known of any such reputation of Rulon D. Hair; further, an opinion of a small group of persons, if you believe such opinion existed, cannot be reasonably expected to give notice of such fact to an ordinary business man, nor be sufficient to create a reputation." Upon the ground and for the reason that the [573] same deals with an issue upon which there is no competent or sufficient evidence justifying the submission of the said matter to the jury.

Defendants object and except to the certain instruction given to the jury, reading as follows: "You are instructed that one driving an automobile owned by another is presumed to be the agent of the owner of said automobile." Upon the ground and for the reason that the same is too limited in its wording and does not contain the necessary limitations with respect to the facts and circumstances touching the issues respecting said automobile.

Defendants object and except to that certain instruction given to the jury, reading as follows: "The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a

manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State Statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that statute it is provided [574] that it shall be *prima facie* lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute that it shall be *prima facie* unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities." Upon the ground and for the reason that the said instruction is based upon a statute covering ordinary negligence in which automobiles are involved and does not have application in the instant case or to any case where the guest statute is involved and that the said instruction would tend to mislead and confuse the jury into considering a case in which this law is involved rather than cases involving the guest statute.

The defendants object to that certain instruction given to the jury, reading as follows: "You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company that the deceased Avenel Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair,

then the defendants are liable if the accident resulting in the death of Avenel Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenel Newby, then your verdict should be for the plaintiffs, if you find for the plaintiffs upon the other issues. Upon the ground and for the reason that said instruction does not cover the pleadings and the [575] facts in this case, particularly in that there is no allegation that the said Rulon D. Hair was intoxicated at the time of the accident and intoxication is not pleaded as a ground for recovery under the guest law and as such could not be the proximate cause of the death of Avenel Newby, and is addressed to an issue which is not properly involved in this case in that the question of the status of Rulon D. Hair as a driver is not properly before the Court on an issue attempting to bind his employers.

The defendants object and except to the giving of that portion of a certain instruction given to the jury and reading as follows: "The amount of damages, if any, which you allow shall in no event exceed the amount prayed for in the plaintiffs' complaint." Upon the ground and for the reason that the plaintiffs in this case should not be allowed to recover more than \$7500. the same being the amount heretofore awarded against R. D. Hair as the agent, servant and employee of said defendant and that

the jury should be so instructed with their instruction on damages.

Comes now the defendants and object to the refusal on the part of the Court to give defendants requested instruction number 11, reading as follows: "You are instructed that in respect to the issue as to damages, if you come to consider that issue, the Court charges you as a matter of law, that in no event in this case can you award damages against the defendants in excess of the sum of \$7500." For [576] the reason that this case has heretofore been tried before a jury as against these defendants and R. D. Hair as agent, servant and employee of said defendants with a joint verdict having been rendered of \$7500. from which judgment the defendants Tobacco Company and Donnelly appealed to the Circuit Court of Appeals, and R. D. Hair did not appeal, and that the said Circuit Court of Appeals reversed the judgment as to the defendants Tobacco Company and Donnelly and remanded the matter for a new trial and a new trial has been had against the last named defendants and that the amount heretofore awarded against the said R. D. Hair servant, agent and employee of the Reynolds Tobacco Company and Donnelly fixes the maximum amount for which any judgment could be rendered in this case.

The defendants object and except to the refusal of the Court to give defendants' requested instruction numbered 12 and reading as follows: "You are instructed that this cause has heretofore been tried and a verdict rendered against all of said

defendant in the sum of \$7500. R. J. Reynolds Tobacco Company and L. R. Donnelly appealed said cause to the appellate Court. Rulon D. Hair did not appeal. Said judgment was reversed as to R. J. Reynolds Tobacco Company and L. R. Donnelly and the cause was remanded for a new trial as against them. The Judgment against Rulon D. Hair was not appealed from either by him or by the plaintiffs. It therefore is final so far as Rulon D. Hair is concerned, and you are to decide [577] this case upon the issues of whether or not R. J. Reynolds Tobacco Company and L. R. Donnelly are also responsible. In this respect, you are specifically charged that the judgment against the defendant, Hair, should not in any sense be taken by you as any evidence of any liability on the part of the Tobacco Company or L. R. Donnelly, but that you must decide the case, so far as liability may be concerned, or the lack of it, as though no previous judgment had been rendered. In this respect, however, you are definitely charged that in the event you should find against these defendants and determine to assess damages, you can not render a verdict in excess of \$7500. This does not mean that the verdict, if you find against said defendant, should reach said sum, but that you are authorized, if you find the plaintiffs entitled to recover against the Tobacco Company and L. R. Donnelly, to fix the amount in such sum as you may find said plaintiffs have been damaged by the acts of R. J. Reynolds Tobacco Company and L. R. Donnelly, not exceeding, however, the sum of \$7500." Upon the

same grounds and for the same reasons as set out in the objection and exception to the refusal to give instruction number 11.

Defendants object and except to the refusal of the Court to give defendants' requested instruction number 18, reading as follows: "You are instructed that where a gratuitous guest, riding in an automobile being driven by another, fails to protest against the driver's proceeding at an excessive [578] speed, such conduct constitutes contributory negligence as to preclude recovery for injuries and damages occasioned by such excessive speed." Upon the grounds and for the reason that the law of the State of Idaho is to the effect that the guest in the automobile is under the necessity of protesting and the failure to protest against the excessive speed, the conduct contributing to the accident, when such guest has an opportunity to do so, and this should preclude the recovery for injuries and damages by such conduct of the said guest.

The defendants object and except to the refusal to give instruction numbered 20 requested by the defendants reading as follows: "The court instructs the jury that the answer of the defendants in this case alleges affirmatively that any injury caused Avenel Newby was due to her own acts of negligence. This is equivalent to an allegation that the contributory negligence of Avenel Newby had a causal connection with the injury. The burden of establishing contributory negligence by a preponderance of the evidence rests upon the defendants. This burden may be discharged but never shifted. You are instructed that the burden is upon the de-

fendants under their charge of contributory negligence to prove not only that Avenel Newby was negligent but that her negligence contributed to and had a causal connection with her death. If, however, contributory negligence appears on the plaintiffs' side of the case and from the plaintiffs' [579] witnesses, whether the same be by direct examination or under cross examination, and from such testimony you find that there was contributory negligence in this case, then and in that event you are instructed that you should consider such defense even though no testimony was offered affirmatively by the defendants in the proof thereof. In this connection, you are further instructed that contributory negligence means: Negligence on the part of Avenel Newby either by an act on her part or omissions when a reasonable person would have acted in an effort to prevent the injury, and which negligence helped to cause or bring about the injury complained of, and you are further instructed that if you believe the said Avenel Newby could have prevented the injury, and failed to do so, you should find for the defendants." For the reason that under the facts in this case the question of contributory negligence of Avenel Newby is supported by the evidence and is a defense pleaded and asserted herein and that the said matter should be submitted to the jury for its consideration as such defense.

Defendants except to the refusal on the part of the Court to give requested instruction number 21 reading as follows: "You are further instructed,

that a gratuitous guest may not recover for his host's negligent operation of an automobile if conscious of apparent danger, or advised of such conditions and circumstances as would herald danger to a reasonably prudent person, he fails opportunely to protest [580] and acquiesces therein, and if you find from the evidence in this case that Avenell Newby knew, or as a reasonably prudent person should have known, that Rulon D. Hair was operating and driving said automobile in a dangerous manner, and you further find that Avenell Newby after a seasonably opportunity so to do, failed to opportunely protest against such dangerous driving and operations of said automobile, then, and in that event, the plaintiffs cannot recover." For the reason and upon the ground that the pleadings and evidence in this case is such as to render it necessary to advise the jury with reference to the conduct and duty of the guest in the car and which requires such guest to seasonably protest and object to the conduct of the driver of the car, and that the law is such that if she failed so to do she would have assumed all the risk and cannot recover in this case.

Defendants excepts to the refusal of the Court to give defendants' requested instruction numbered 22, reading as follows: "You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair had been drinking intoxicating liquor, and that the said Avenell Newby joined with him and also drank intoxicating liquor, and that the two of them were riding in said automobile while under

the influence of intoxicating liquor, then and in that event you are instructed that the said Avenel Newby assumed the [581] risk of any danger or damage that might result from the use of intoxicating liquor and was contributorily negligent in her conduct, and under such circumstances, the plaintiffs cannot recover in this case.” For the reason that the law of Idaho is to the effect if a guest participates and joins with the driver of an automobile in imbibing intoxicating liquor, the guest is equally liable with the driver and is contributorily negligent and assumes the risk of riding in said automobile and there is sufficient evidence in this case to require the giving of such instruction.

For the assigned reasons and various other reasons having application to this case the instructions given and objected to herein did not state the law covering the trial and controlling in this case, but tended to confuse and mislead the jury and that the requested instructions which were not given, state the law applicable to the facts in this case and were necessary for the protection of the rights of these defendants.

Mr. Davis: Comes now the plaintiffs and excepts and objects to the giving of the instruction to the jury reading as follows: “You are instructed, that there has been evidence introduced in this cause touching an action in which Rulon D. Hair was involved in Pocatello, Idaho, in April, 1939, and certain litigation which resulted from that accident. The only purpose for which such evidence was [582] admitted was upon the question of whether or not the R. J. Reynolds Tobacco Company and L. R. Don-

nely knew of said action and whether or not such knowledge, if they had it, could be considered as a waiver of their instructions against Hair hauling guests and you should not consider any of this evidence as bearing upon any of the other issues in this case." For the reason that the following language: "You should not consider any of this evidence as bearing upon any of the other issues in this case," unduly limits the evidence of the accident in April 1939 to the question of waiver only, and that the plaintiffs are entitled to have all the evidence as to all of the acts shown to have been brought to these defendants' attention and knowledge and to have it considered by the jury on all phases of the case; for the reason that any act that is brought to the knowledge of the defendants in this case is notice to them of recklessness, and whether it be in reference to a prior accident or whether it be as to waiver or as to guests, it should be considered by the jury.

(The jury retired to consider its verdict and returned with a verdict later the same day.)

March 24, 1945, 10 A. M.

Mr. Davis: I am directing the Court's attention to the fact that the verdict was rendered in favor of the plaintiffs and also to the showing made by Mr. Newby on the motion to stay proceedings until the costs were paid. [583] Mr. Newby set forth in his affidavit that he was agreeable that the judgment against him in the Circuit Court of Appeals for costs on appeal might be credited against any judgment that he might receive against the defendants

in this case, and I now offer, if the Court please, on behalf of the plaintiffs in this case, that the amount of costs that were awarded against the plaintiff in the Circuit Court of Appeals be credited on the judgment that is now to be entered and we agree and stipulate that if any execution is issued upon the judgment secured by the plaintiff that the defendants may have credit for the amount of costs awarded against Newby in the judgment of reversal by the Circuit Court of Appeals. In fact I am willing to have this done either way counsel for the defendants desire.

The Court: It is your desire that the clerk enter judgment in accordance with the verdict, and then enter the costs or do you desire to credit the costs against the amount of the judgment.

Mr. Merrill: I don't think we should be put on that spot. We have excepted to the verdict and if this should be appealed we do not want to be, and ought not be put in the position where we have waived this item. I fear there might be a waiver of this item.

The Court: I don't see how it would be effected in any way in directing the Clerk to enter the [584] judgment. The judgment, I feel sure, should be entered giving credit for the costs as so ordered by the Court, but if you feel that should not be done, then the Clerk would necessarily enter judgment for the full amount of the verdict. If you don't consent to it, I took that into consideration in denying the stay. If you don't want to agree to that at this time

I think the proper procedure would be for the clerk to enter judgment for the full amount.

Mr. Merrill: I don't see how I can agree to that at this time.

The Court: Then the clerk, I presume, will have to enter judgment on the verdict in view of the position counsel has taken.

Mr. Merrill: I haven't taken any position.

The Court: I understood you to say that you couldn't agree to any arrangement at this time.

Mr. Merrill: If it is credited on the judgment I want it understood that we would not be deprived of the attempt to collect it in the event this present judgment should be overruled by the Circuit Court of Appeals.

The Court: I think the best way to handle it under the circumstances is to have the judgment entered for the full amount as set up in the jury's verdict with the understanding that at any future date this amount may be credited on that judgment. [585]

CERTIFICATE

State of Idaho, County of Ada—ss.

I, G. C. Vaughan, the duly appointed, qualified and acting official Reporter of the District Court of the United States, in and for the District of Idaho, do hereby certify that I reported in shorthand the testimony of the witnesses sworn on behalf of the respective parties in the above entitled cause, and also that I reported the proceeding had in and about the trial of the said cause, and that I thereafter transcribed said shorthand notes into longhand,

typewriting, and that the within and foregoing constitutes and is a full, true and correct copy of the transcript of the testimony given and the proceedings had in the said cause, consisting of pages numbered 1 to 465, excluding this certificate.

In witness whereof, I have hereunto set my hand this first day of September, 1945.

G. C. VAUGHAN

Official Reporter.

[Endorsed]: Filed Sept. 5, 1945. [586]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL BY R. J. REYNOLDS TOBAC-
CO COMPANY.

Comes now the appellant, R. J. Reynolds Tobacco Company, one of the above named defendants, and hereby designates the contents of the record, proceedings and evidence to be contained in the record on appeal of the above entitled cause to the Circuit Court of Appeals for the Ninth Circuit, as follows:

1. Complaint.
2. Petition for order appointing guardian ad litem.
3. Order appointing guardian ad litem.
4. Order for removal to the United States District Court for the District of Idaho, Eastern Division.

5. Motion to dismiss and to make more definite and certain by Rulon D. Hair.

6. Order on Motions.

7. Demand for jury trial.

8. Amended Complaint.

9. Motion to dismiss, motion for more definite statement, and motion to strike, directed to amended complaint, by R. J. Reynolds Tobacco Company and L. R. Donnelly.

10. Order re motion to dismiss, etc., of R. J. Reynolds Tobacco Company and L. R. Donnelly.

11. Answer of R. J. Reynolds Tobacco Company and L. R. Donnelly to amended complaint [587]

12. Answer of defendant, Rulon D. Hair, to amended complaint.

13. Verdict of jury, October 23, 1943, on first trial of case.

14. Judgment on Verdict, October 23, 1943, on first trial of case.

15. Notice of appeal filed by R. J. Reynolds Tobacco Company and L. R. Donnelly, dated January 20, 1944, from judgment entered October 23, 1943, at conclusion of first trial.

16. Cost bond on appeal, of R. J. Reynolds Tobacco Company and L. R. Donnelly, from judgment entered at conclusion of such first trial.

17. Mandate on reversal, of United States Circuit Court of Appeals for the Ninth Circuit, dated December 8, 1944, filed December 11, 1944, together with amount of costs allowed and taxed.

18. Motion of R. J. Reynolds Tobacco Company

and L. R. Donnelly for an order staying further proceedings until costs taxed of \$740.12 against plaintiffs on the appeal, in the United States Circuit Court of Appeals for the Ninth Circuit, are paid, together with affidavit of A. L. Merrill in support of such motion, and affidavits of B. W. Davis and George H. Newby in opposition, and Court's minute of denial of said motion dated March 14, 1945.

19. Verdict of jury, March 23, 1945, on second trial of case.

20. Judgment on Verdict, March 24, 1945, on second trial of case.

21. Petition on motion for judgment notwithstanding verdict and, in the alternative for a new trial, and motion for a new trial filed by R. J. Reynolds Tobacco Company.

22. Affidavit of A. L. Merrill in support of motion for new trial.

23. Affidavit of B. W. Davis in opposition to motion for new trial.

24. Court's order denying motion of R. J. Reynolds Tobacco Company for judgment notwithstanding verdict and in the alternative for a new trial, and motion for a new trial.

25. Notice of appeal filed by R. J. Reynolds Tobacco Company.

26. Cost bond on appeal of R. J. Reynolds Tobacco Company. [588]

27. Petition of R. J. Reynolds Tobacco Company for approval of Supersedeas Bond and Stay on Appeal.

28. Order approving bond and granting stay of execution against R. J. Reynolds Tobacco Company.

29. All testimony taken at second trial contained in reporter's transcript, including all instructions given to the jury, and all instructions refused and exceptions taken thereto; two copies of such transcript copy, including such instructions and exceptions, are herewith filed with the clerk.

30. The exhibits to be printed in the record, to-wit:

Exhibits numbered:

14. Report of L. R. Donnelly, dated September 15, 1942.

17. Salesman's agreement on delivery of car.

19. Instructions of R. J. Reynolds Tobacco Company and answer of Rulon D. Hair, dated March 17, 1938.

20. Letter of commendation to Rulon D. Hair, dated June 12, 1940.

24. Certified copy of court record in the case of State of Idaho vs. Rulon D. Hair, being the information and verdict of the jury and certificate .

25. Letter of E. A. Darr. (Page 36 of Darr's deposition).

26. Letter of R. J. Reynolds Tobacco Company to salesmen, November 4, 1937.

31. Stipulation re Exhibits.

32. Order re Exhibits.

33. All court minutes.

34. Two copies of reporter's transcripts, second trial.

35. Designation of contents of record on appeal of R. J. Reynolds Tobacco Company, and proof of service. [589]

36. Statement of points by R. J. Reynolds Tobacco Company, and proof of service.

Dated this 15th day of June, 1945.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL,

Attorneys for R. J. Reynolds
Tobacco Company.

Service of the foregoing Designation of Contents of Record on Appeal, by receipt of copy thereof, admitted to have been made this 15th day of June, 1945.

GLENN A. COUGHLIN,

B. W. DAVIS,

Attorneys for Plaintiffs and
Appellees.

[Endorsed]: Filed June 15, 1945. [590]

[Title of Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT R. J. REYNOLDS TOBACCO COMPANY INTENDS TO RELY ON APPEAL.

Comes now R. J. Reynolds Tobacco Company, one of the above named defendants, and appellant, and makes the following statement of points upon which it intends to rely on the appeal taken by it to the Circuit Court of Appeals for the Ninth Circuit in the above entitled cause:

I.

The Trial Court should have required the plaintiffs to elect as between two theories advanced in the amended complaint, that is to say, whether they relied for recovery upon the charge of direct negligence against these appellants, or upon the rule of respondent superior as applied to Rulon D. Hair.

II.

There was no negligence on the part of this appellant proximately causing the injury alleged in the amended complaint; further Rulon D. Hair was not acting as a servant, agent or employee of appellant, nor within the scope of any employment for appellant, at the time of the accident alleged in the amended complaint.

III.

The Trial Court should not have permitted introduction at the trial of the cause, various items of evidence appearing in the transcript of the evidence and to which appellant interposed objections, particularly the testimony of the witnesses Smullen, Buskirk, Pugmire, [591] L. R. Donnelly, relating to the so-called Meyers incident; also the testimony of the witnesses Buskirk, Pugmire and Close relating to the reputation of Rulon D. Hair as a driver of an automobile; also the introduction of evidence relating to various other and outside incidents; in failing to sustain appellant's objections to the introduction of such evidence and in failing to strike the

same and in failing to instruct the jury to disregard such testimony, and in permitting plaintiffs, over objection of appellant, to introduce part of the deposition of E. A. Darr on cross examination before any direct examination had been offered; in admitting in evidence various exhibits objected to and particularly Exhibit No. 24, being a certified copy of Information and Verdict of Jury in the case of State of Idaho vs. Rulon D. Hair. that recitation of the foregoing items is not deemed exclusive, in that there are various other claimed errors committed in the admission and rejection of evidence, as disclosed by the record of the testimony in said cause.

IV.

The evidence introduced at the trial of said cause was wholly insufficient to justify or sustain a verdict against appellant upon any theory; more particularly, the evidence fails to show appellant guilty of negligence in employing and continuing in its employment Rulon D. Hair and delivering to him the panel truck referred to in the amended complaint, and further insufficient to prove that Hair had a status of a drunken and incompetent driver.

V.

The evidence conclusively proved that at the time of the accident alleged in the amended complaint, Rulon D. Hair was not acting within the scope of any employment for and on behalf of appellant.

VI.

The evidence is further insufficient to show that, at the time of said accident, Rulon D. Hair was in anywise guilty of violating the gratuitous guest statute of the State of Idaho, or that appellant was in anywise liable for the conduct of Rulon D. Hair.

VII.

The trial court should have granted the motion for a directed verdict in favor of appellant upon the grounds made at the close of the evidence and restated in its petition on motion for judgment notwithstanding the verdict and, in the alternative, for a new trial, filed in said cause following the verdict of the jury, for the reasons and upon the grounds stated in said petition and motion.

VIII.

There was no waiver on the part of appellant of its injunction that Rulon D. Hair should not transport a guest in said panel truck.

IX.

Avenell Newby was riding in the panel truck as a gratuitous guest of Rulon D. Hair and not of appellant, and appellant was in nowise responsible for the conduct of Rulon D. Hair at the time of said accident; that Avenell Newby participated in all of the acts of Rulon D. Hair and joined with him in each and every act performed prior to the accident, and was in a position to be as observant of surround-

ing conditions immediately preceding said accident and of all acts of commission or omission on part of Rulon D. Hair, if any there were, as was Hair himself, and, having thus joined with Hair in said trip and in the conduct thereof, became barred and estopped, and the plaintiffs and appellees became barred and estopped from claiming damages for any injury that might have been sustained by Avenell Newby as a gratuitous guest of Rulon D. Hair. [593]

X.

Avenell Newby assumed any and all risk attendant upon the trip with Rulon D. Hair, and, by reason of the matters and things recited in the testimony, became estopped from claiming damages by reason of anything suffered or permitted at the time and place mentioned in the amended complaint, which estoppel is effective as against the plaintiffs and appellees.

XI.

There should not have been given to the jury those certain instructions to which objection was made by appellant at the time said instructions were given, and there should have been given to the jury those requested instructions presented by appellant and refused by the trial court.

XII.

The trial court erred in failing and refusing to consider and recognize the derivative liability of appellant, if any there was, as resting upon or hav-

ing been derived from the original liability of Rulon D. Hair, in the event any such liability existed and not otherwise.

XIII.

Without waiving the general objections to the instructions given and those refused, referred to in Paragraph XI hereof, the trial court erred in instructing the jury that if it found in favor of the plaintiffs, that the amount of damages allowed should in no event exceed the amount prayed for in plaintiffs' complaint, and in failing to instruct the jury that in the event the jury should find in favor of plaintiffs and appellees its verdict could not exceed a maximum sum of \$7,500.00, for the reason that the verdict and the judgment thereon rendered and entered at the conclusion of the first trial in this cause and for said sum and the same became final and conclusive against Rulon D. Hair in that neither Rulon D. Hair nor plaintiffs and appellees perfected any appeal from such verdict and judgment [594] and thereby became the maximum measure of damages, if any, which could have been found against appellant by the jury.

XIV.

The jury, having failed to find against the defendant, L. R. Donnelly in this case, could not properly find against this appealing defendant, R. J. Reynolds Tobacco Company.

XV.

The verdict of the jury is excessive and was rendered under passion and prejudice and a misunderstanding of the law and facts, and the trial court should have set aside the verdict and the judgment rendered thereon and should have granted appellant's petition on motion for judgment notwithstanding the verdict and in the alternative for a new trial upon the grounds, as well as other grounds, urged in said petition and motion.

XVI.

Generally, there was no negligence on the part of appellant proximately causing the death of Avenell Newby, and appellant was in nowise liable or responsible at the time and place of said accident for acts of commission or omission, if any there were; by Rulon D. Hair; that at said time and place Rulon D. Hair was not acting within the scope of his employment as an agent, servant or employee of appellant, and it is in nowise liable under the guest statute of Idaho, or otherwise, to the appellees in this cause; that evidence prejudicial to appellant was improperly admitted at the trial of said cause, and the court on motion of appellant refused to strike evidence improperly admitted; that the trial court gave to the jury erroneous instructions and improperly refused to give certain requested instructions; that the verdict against appellant and the judgment entered thereon is excessive and erroneous and in nowise supported by the evidence or the law governing and controlling this action. [595]

Dated June 15th, 1945.

E. B. SMITH,
A. L. MERRILL,
R. D. MERRILL,

Attorneys for R. J. Reynolds
Tobacco Company.

Service of the foregoing Statement of Points by receipt of copy thereof admitted to have been made this 15th day of June, 1945.

GLENN A. COUGHLIN,
B. W. DAVIS,

Attorneys for Plaintiffs and
Appellees.

[Endorsed]: Filed June 15, 1945. [596]

[Title of Court and Cause.]

AMENDMENT TO DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now R. J. Reynolds Tobacco Company, one of the above named defendants, having heretofore filed its Designation of Contents of Record on Appeal and being now desirous of adding to said Designation the Motion to Dismiss and Make More Definite and Certain filed by R. J. Reynolds Tobacco Company, and, by reason of a stipulation and order thereon heretofore made and filed transmitting Exhibit 14 in its original form and deleting said Exhibit from Designation Number 30, hereby amends said Designation of Contents of Record on Appeal as follows:

Amends Designation Number 5 to read:

“5. Motions to Dismiss and to Make More Definite and Certain by R. J. Reynolds Tobacco Company and L. R. Donnelly, and by Rulon D. Hair.”

Delete from Designation Number 30, the following:

“14. Report of L. R. Donnelly, dated September 15, 1942.”

Add a new designation to read as follows:

“37. Amendment to Designation of Contents of Record on Appeal of R. J. Reynolds Tobacco Company and Proof of Service.”

Dated this 30th day of July, 1945.

E. B. SMITH,
A. L. MERRILL,
R. D. MERRILL,

Attorneys for R. J. Reynolds
Tobacco Company. [597]

Service of the foregoing Amendment to Designation of Contents of Record on Appeal by receipt of copy thereof, admitted to have been made this 30th day of July, 1945.

GLENN A. COUGHLIN,
B. W. DAVIS,

Attorneys for Plaintiffs and
Appellees.

[Endorsed]: Filed August 4, 1945. [598]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRANS-
SCRIPT OF RECORD.

United States of America, District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 598, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$66.95, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 5th day of September, 1945.

[Seal]

ED. M. BRYAN,
Clerk.

[Endorsed]: No. 11137. United States Circuit Court of Appeals for the Ninth Circuit. R. J. Reynolds Tobacco Company, a Corporation, Appellant, vs. George H. Newby, in His Own Behalf, Richard Arlen Newby and Patty Ann Newby, Both Minors, by Their Guardian ad litem, George H. Newby, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the District of Idaho, Eastern Division.

Filed September 11, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 11137

R. J. REYNOLDS TOBACCO COMPANY,
Appellant,
vs.

GEORGE H. NEWBY, in his own behalf, RICH-
ARD ARLEN NEWBY and PATTY ANN
NEWBY, both minors, by their guardian ad
litem, GEORGE H. NEWBY,
Appellees.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL, AND DESIGNATION OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF.

Comes Now the appellant and hereby adopts as its Statement of Points upon which it intends to rely on appeal, the Statement of Points on which Appellant, R. J. Reynolds Tobacco Company, Intends to Rely on Appeal, heretofore filed with the Clerk of the United States District Court for the District of Idaho, from which Court this appeal is taken, such Statement of Points being that appearing in the transcript certified to this Court for said Clerk of the United States District Court for the District of Idaho.

The appellant hereby designates for printing, as the parts of record necessary for the consideration

of said points, the entire transcript as certified to the Clerk of this Court by the said Clerk of the United States District Court for the District of Idaho, including those exhibits which are enumerated in Paragraph numbered 30 of the Designation of Contents of Record on Appeal by R. J. Reynolds Tobacco Company, and Amendment to Designation of Contents of Record on Appeal, expressly specifying, however, that the exhibits not therein requested to be printed be not printed, being Exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 27, referred to in the Stipulation relating thereto filed with said Clerk of the United States District Court for the District of Idaho and appellant prays that such exhibits be considered in their original form by this Court as a part of the record on such appeal.

E. B. SMITH,

A. L. MERRILL,

R. D. MERRILL,

Attorneys for Appellant.

Service of the foregoing Statement admitted to have been made this 10th day of September, 1945.

GLENN A. COUGHLAN,

B. W. DAVIS,

Attorneys for Appellees.

[Endorsed]: Filed Sept. 17, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER DISPENSING
WITH PRINTING EXHIBITS

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of R. J. Reynolds Tobacco Company respectfully shows:

That an appeal has been perfected by your petitioners to this Court from a judgment rendered in the United States District Court for the District of Idaho, in a suit wherein George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by and through George H. Newby, their guardian ad litem, were plaintiffs, and R. J. Reynolds Tobacco Company and L. R. Donnelly were defendants.

There were introduced in evidence at the trial of the cause by the respective parties, the following exhibits, to-wit:

Plaintiffs' Exhibits numbered 1 to 6, inclusive; 9 to 16, inclusive; 24, 25 read from deposition of E. A. Darr; also Defendants' Exhibits numbered 7, 8, 17; 18 read from deposition of E. A. Darr; 19, 20; 21 and 22 read from deposition of E. A. Darr; 26 and 27.

That Plaintiffs' Exhibits numbered 24 and 25, and Defendant's Exhibits numbered 17 to 22, inclusive, and 26 will be printed in full in the record.

That the exhibits which appellant and appellees believe would be impractical and difficult to print and for which no application to print has been made, are: Plaintiffs' exhibits numbered 1 to 6,

inclusive; 9 to 16, inclusive; also Defendant's Exhibits numbered 7, 8 and 27; being two maps, photographs, and involved printed reports and records, which appellant and appellees believe would be impractical and difficult to print, being referred to in the stipulation by appellant and appellees filed with the Clerk of the United States District Court for the District of Idaho, from which Court said appeal has been taken, such exhibits to be taken and considered as a part of the record on such appeal.

All of said original exhibits have been forwarded by the Clerk of the United States District Court for the District of Idaho to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. There is attached hereto an affidavit of E. B. Smith, which is made a part hereof.

Wherefore, your petitioners pray for an order dispensing with the printing of Plaintiffs' Exhibits numbered 1 to 6, inclusive; 9 to 16, inclusive, and Defendant's Exhibits numbered 7, 8, and 27; and that the said original exhibits be considered by this Court on such appeal.

R. J. REYNOLDS TOBACCO
COMPANY.

By E. B. SMITH.

By A. L. MERRILL.

R. D. MERRILL,

Attorneys for Appellant.

So ordered.

CLIFTON MATHEWS,

United States Circuit Judge.

Filed: September 17, 1945.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF E. B. SMITH

State of Idaho,

County of Ada—ss.

E. B. Smith, being first duly sworn, deposes and says:

That he is one of the attorneys for R. J. Reynolds Tobacco Company, appellant herein, and makes this affidavit on behalf of appellant for the purpose of securing an order dispensing with the printing of certain exhibits, all as stated in the Application for Order attached hereto.

That judgment was rendered herein in favor of the plaintiffs and against the defendant on March 24, 1945; that on June 13, 1945, defendant R. J. Reynolds Tobacco Company perfected an appeal to this Court by filing its Notice and Undertaking on Appeal, and has since served and filed the additional papers required by the rules of this Court.

That on July 2, 1945, the Honorable Chase A. Clark, District Judge, made an order directing the original exhibits, numbered 1 to 16, inclusive, and 27, be forwarded to this Court with the record on appeal to be used on such appeal, following stipulation of the parties through their respective counsel of record, entered into on June 27th, 1945, and duly filed, to the effect that such exhibits are of such character as to be difficult to print and can best be considered by the appellate court in their original form, thus leaving for printing such exhibits as do not offer difficulty in printing; that the exhibits which it is requested be not printed present diffi-

culties in printing and would decidedly encumber the record, as will more particularly appear from an examination of said exhibits, and that such exhibits may probably serve the appellate court better in their original form.

E. B. SMITH.

Subscribed and sworn to before me this 8th day of September, 1945.

[Seal] WILLIS C. MOFFATT,
Notary Public for Idaho, residing at Boise, Idaho.
My Commission Expires January 28, 1946.

Copy of foregoing application for order admitted this 10th day of September, 1945.

GLENN A. COUGHLAN,
B. W. DAVIS,
Attorneys for Plaintiffs and Appellees.

[Endorsed]: Filed Sept. 17, 1945. Paul P. O'Brien, Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

R. J. REYNOLDS TOBACCO COMPANY,
A Corporation,

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,
both minors, by their Guardian ad litem, George H. Newby,
Appellees.

Brief of Appellants

On Appeal from the District Court of the United States for the
District of Idaho, Eastern Division

E. B. SMITH
Residence: Boise, Idaho

A. L. MERRILL
R. D. MERRILL
Residence: Pocatello, Idaho
Attorneys for Appellants

FILED

1100 29 1945

PAUL P. O'BRIEN
CLERK

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

R. J. REYNOLDS TOBACCO COMPANY,
A Corporation,

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,
both minors, by their Guardian ad litem, George H. Newby,
Appellees.

Brief of Appellants

On Appeal from the District Court of the United States for the
District of Idaho, Eastern Division

E. B. SMITH
Residence: Boise, Idaho

A. L. MERRILL
R. D. MERRILL
Residence: Pocatello, Idaho
Attorneys for Appellants

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No. 11137

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. J. REYNOLDS TOBACCO COMPANY,
A Corporation,

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,
both minors, by their Guardian ad litem, George H. Newby,
Appellees.

Brief of Appellants

JURISDICTION

This action was commenced in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bear Lake, on September 29, 1942, by the filing of a complaint by George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, against R. J. Reynolds Tobacco Company, a corporation organized under the laws of North Carolina, and L. R. Donnelly and Rulon D. Hair, residents and citizens of the State of Utah, to recover \$383.20 special damages, and \$100,000.00 general damages,

and costs of suit, for alleged injury to, and death of, Avenell Newby, wife of George Newby and mother of the two minors (R.2-7).

October 26, 1942, upon petition of defendants, an order was made by the State District Court for removal of said cause to the United States District Court for the District of Idaho, Eastern Division (R.10-11), jurisdiction having been invoked under Sec. 24 of the Judicial Code as amended, 28 U.S.C.A. Sec. 41.

April 9, 1943, the trial court, over the objections of the defendants, granted plaintiff's motion to file an amended complaint (R.17-22), a portion of which was later stricken (R.26). July 15, 1943, defendants filed an answer to the amended complaint (R.27-33). The cause, first tried before the trial court with a jury, resulted in a verdict, returned October 23, 1943, against R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, for \$7,500.00 (R.41), upon which, judgment was entered (R.41-42). The cause was appealed to the United States Circuit Court of Appeals for the Ninth Circuit by R. J. Reynolds Tobacco Company and L. R. Donnelly on January 20, 1944 (R.43). Rulon D. Hair did not appeal. The judgment was reversed and the cause remanded to the District Court with directions to grant a new trial (R.46-48; 145 Fed. 2d 760). The cause was again tried before the trial court with a jury and resulted in a verdict, returned March 23, 1945, against R. J. Reynolds Tobacco Company for \$30,000.00 (R.67), upon which, judgment was entered (R.67-68). No verdict was rendered against L. R. Donnelly. Appellant R. J. Reynolds Tobacco Company

thereupon filed a petition on motion for judgment notwithstanding the verdict and, in the alternative a new trial, and motion for a new trial (R.69-96). The motion was denied (R.100-101).

Notice of appeal was filed by the appellant, R. J. Reynolds Tobacco Company, on June 13, 1945 (R.101), under Rules 73 and 74 of the Rules of Civil Procedure. Bonds on appeal and for supersedeas were thereupon filed and approved (R.102-104). The record on appeal was certified by the Clerk of the District Court on September 5, 1945, (R.534). The jurisdiction of this Court is invoked under Sec. 128 of the Judicial Code as amended, 28 U.S.C.A., Sec. 225 (a).

STATEMENT OF THE CASE

On September 11, 1942, and for several years prior thereto, Rulon D. Hair was and had been in the employ of appellant, R. J. Reynolds Tobacco Company, as a salesman. His immediate superior and district manager was L. R. Donnelly. He was furnished a panel truck for his use in the business of his employer, with direct instructions, both oral and in writing, never to use the truck for transporting a guest (R.251). During the evening of September 10, 1942, at Montpelier, Idaho, at the solicitation of Avenell Newby (R.385-388; 462-464), Hair transported Mrs. Newby in this truck from Montpelier to the "Aero Club," a night club about six miles east of Montpelier, where they danced and drank until about 2 or 3 o'clock a. m. of the following morning, September 11 (R.391). They then left the Aero Club and drove back to Montpelier. Mrs. Newby did not want to go home but urged

Hair to take her to Soda Springs, a distance of about 30 miles (R.398), to visit another night club (R.391-393). Hair yielded, and they arrived at Soda Springs about 4:30 or 5 o'clock a. m. (R.394). The club was closed. They thereupon went to the Enders Hotel in Soda Springs, obtained a room, and occupied it together until about noon of September 11 (R.372-4; 394-5; 416; 453, 456). They then went to the Oasis Club in Soda Springs, where they remained until about 2:30 o'clock p. m. of said day (R.397). At this place Mrs. Newby again drank some intoxicating liquor (R. 397). They then drove to Grace, Idaho, where Hair intended to see an acquaintance and get him to advise his wife at Pocatello, Idaho, that he would be later than usual getting home (R.397). Then they travelled toward Montpelier, Idaho, for the express purpose of taking Mrs. Newby home (R.398). On the way home to Montpelier, on highway No. 30 North, the car seemingly went out of control and tipped over (R.399-402). Mrs. Newby was seriously injured and died a few days later.

Mr. Hair and Mrs. Newby were together on a party of their own for a period of about 18 hours and up until the time of the accident, during which time Hair admitted that he was doing no business whatever for his employer (R.398, 411-412). There is no evidence whatever, aside from presumptions, all of which appellant contends were overcome, that Hair was acting within the scope of his employment. Avenell Newby was, during all of the time she was in the panel truck, a gratuitous guest of Hair. Hair knew that he had no right to use the truck for this purpose and was violating the positive instructions of his employer and would be

discharged if appellant or Mr. Donnelly should find this out (R.382, 384, 390, 412). During these 18 hours the two of them were eating, drinking, dancing, staying in a hotel room from 6 to 7 hours at Soda Springs, and using the panel truck wholly and entirely for their own pleasure.

Following the death of Avenell Newby, appellees instituted suit against appellant, R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, and by their Amended Complaint, filed after removal of the case to the United States District Court, charged that Hair at the time of the accident was acting within the scope of his employment; further alleged that Hair was permitted to operate the truck notwithstanding that appellant, R. J. Reynolds Tobacco Company, and L. R. Donnelly, knew that he "was a careless, reckless, and negligent driver of an automobile, and was in the habit of hauling guests contrary to instructions," and further, that Hair so recklessly drove and operated the truck that it ran off the highway, tipped over, and inflicted injuries to Avenell Newby, a guest of Hair and defendants, from the effects of which her death occurred, and claimed damages against the defendants. Such Amended Complaint was further amended during the third day of the second trial, substituting the word "drunken" in place of the word "incompetent," over appellant's objection (R.316-317). In their Answer to the Amended Complaint, defendants denied that at the time of said accident Hair was acting within the course or scope of his employment, alleging that he was entirely on a party of his own and acting contrary to instructions; denied that Hair was a careless, reckless, or incompetent driver of an automobile

or that he had hauled guests therein with the knowledge of defendants; affirmatively alleged contributory negligence on the part of Avenell Newby and that she, as a gratuitous guest of Rulon D. Hair, fully and freely acquiesced in everything done by him in the driving of said truck and therefore assumed all risks attendant to the trip and, that the injuries which she may have sustained, and damages, if any, thereby suffered by the appellees, were the result of matters over which the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, had no control (R. 27-33).

The first trial resulted in a verdict and judgment against R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, for \$7,500 and costs (R.41-42). R. J. Reynolds Tobacco Company and L. R. Donnelly appealed from said judgment. Rulon D. Hair did not appeal, nor did appellees appeal from the judgment against Hair. The judgment was reversed by the appellate court as to R. J. Reynolds Tobacco Company and L. R. Donnelly (145 F. 2d 768). The judgment thereupon became final as to Rulon D. Hair.

Appellees sought recovery at the second trial against appellant and defendant L. R. Donnelly (R.110-113). At this trial, and over objections of appellant and defendant L. R. Donnelly on the ground of immateriality and irrelevancy and in nowise tending to prove the status of Hair as an incompetent driver nor a waiver on the part of appellant and L. R. Donnelly of its injunction to Hair not to haul guests, the court permitted proof of an accident in which Hair was involved in Pocatello, Idaho about 3½ years prior to the accident involved in this case (R.220-233; 265-287; 310-314; 345-

351; 354-357). Further, over objections of the defendants on the grounds of immateriality and irrelevancy, the trial court permitted testimony of Hair's hauling guests on some three or four occasions during approximately four years, without any showing at all that either of such defendants had any knowledge whatever of such occurrences (R.329). The trial court further permitted various witnesses, over objections of the defendants, to give their opinion as to the reputation of Hair as a careless and incompetent driver, and refused to strike such evidence upon motion of the defendants after said witnesses had admitted on cross-examination that their conclusions were based upon specific incidents and purported information within the knowledge solely of police officers (R.318-341). Various other items of evidence were introduced over objections of the defendants, to which reference will be made in argument.

At the conclusion of the evidence, appellant and defendant Donnelly moved for a directed verdict upon the allegations contained in paragraph VII of the Amended Complaint charging that Hair was a careless and reckless driver and known to be such to his employer and was in the habit of hauling guests contrary to instructions and also moved for a directed verdict upon the entire Complaint, upon the ground that the evidence was insufficient to support a verdict (R.488-492). The defendants also moved the court to compel plaintiffs to elect upon which of the two theories outlined in their Amended Complaint they would rely for recovery (R.360). All of said motions were denied. Prior to the close of the evidence, the defendants made requests for various instructions to the jury,

among which were instructions to the effect that by reason of the fact that liability, if any, against said defendants was derivative from the servant, Hair, and, that judgment against Hair had become final and no appeal had been taken therefrom by appellees, that the jury could in no event, return a verdict in excess of \$7,500. The trial court failed to so instruct the jury and exceptions were duly taken. Certain instructions requested and refused will be hereafter referred to. Various exceptions were also taken to instructions given to the jury (R. 507-517). The jury returned a verdict in favor of the plaintiffs and against R. J. Reynolds Company for \$30,000. No verdict was returned against the defendant L. R. Donnelly. Appellant took exception to the reception of the verdict (R. 66-67).

After entry of judgment, appellant moved for judgment notwithstanding the verdict, and in the alternative, for a new trial (R.69-96). These motions were predicated upon the insufficiency of evidence to justify the verdict and various errors at law occurring at the time of the trial, excessiveness of the verdict due to the influence of passion and prejudice aroused by the uniform of the sailor, and copious newspaper articles in the possession of and read by members of the jury, tending to inflame and distort the judgment of the jurors (R.76, 89-96). These motions were denied (R.100-101).

Appellant's position on this appeal is that it is not liable for the conduct of Rulon D. Hair at and for a time prior to the accident involved in this case; that no liability of appellant existed in favor of Avenell Newby or appellees; that if appellant is liable such liability cannot exceed \$7500.00; that

the trial court erred in its ruling touching various items of evidence, in giving various instructions to which objections were made, and in refusing to give certain requested instructions, its denial of appellant's motion for a directed verdict, and for judgment notwithstanding the verdict and, in the alternative, for a new trial, all of which, including the manner in which the various points are raised, will be hereafter more fully explained.

QUESTIONS PRESENTED

1. Whether or not the court should have compelled the payment of costs on the appeal, prior to proceeding with the second trial. This question arose on motion.

2. Whether or not this case should have been submitted to the jury on two theories, i. e., claimed negligence of the employer in employing an alleged reckless driver and, claimed violation of the guest statute. These questions were raised by objection to introduction of evidence, motion to strike from amended complaint, motion to compel plaintiffs to elect and objections to instructions to the jury.

3. Whether or not the court erred in admitting in evidence, over objections of appellant, various statements of witnesses, in an attempt to prove Rulon D. Hair was a reckless, careless and drunken driver and carried a guest contrary to instructions, when such testimony dealt entirely with one incident. These questions were raised by objections to the evidence and motions to strike.

4. Whether or not direct testimony of a witness, shown

to be incompetent on cross-examination, should be stricken on motion.

5. Whether or not the court erred in admitting in evidence details of the Myers incident and the record of conviction of Rulon D. Hair. These questions were raised by objections to the evidence and motions to strike.

6. Whether or not, in a case controlled by the guest statute of Idaho, the court can properly instruct the jury on simple negligence. This question arose on objection to instructions.

7. Whether the evidence as a whole can support the verdict. This question was raised by motion for directed verdict and motion for judgment notwithstanding the verdict and in the alternative for a new trial.

8. Whether or not an alleged employer can be held in damages for an amount greater than that which was rendered against an employee, where such judgment against the employee became final, and the alleged liability of the employer is derivative. This question was presented on objection to instructions and refusal to give other instructions to the jury.

9. Whether or not a new trial should have been granted in this case.

SPECIFICATIONS OF ERROR

I.

The court erred in denying appellant's motion for a stay of trial of this cause until appellees had paid costs which had been awarded against them on the prior appeal (R.48-49, 60).

II.

The court erred in denying appellant's motion to strike that portion of Paragraph VII of the Amended Complaint as follows:

"Notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions" (R.25-26).

also in permitting said allegation to be amended by substituting the word "drunken" for the word "incompetent" (R. 316-317); and in denying or failing to rule upon appellant's motion to compel appellees to elect upon which of the two theories advanced in the Amended Complaint they would rely for judgment, that is to say, "whether they will rely upon the theory that Hair was acting within the scope of his employment when driving Avenell Newby as a guest or whether they will attempt to rely upon the theory that Hair was an incompetent, drunken and reckless driver and known as such to these defendants" (R.360).

III.

The court erred in permitting appellees to read in evidence the cross-examination on deposition of E. A. Darr, prior to the time any direct testimony of Mr. Darr had been introduced, to which appellant objected "upon the ground that it is immature and * * * that the cross-examination of a witness whose direct examination is not before the jury is confusing and is improper in the presentation of the matter to the jury.

particularly where the original testimony has not been produced" (R.213-214).

IV.

The court erred in permitting appellees to read in evidence from the cross-examination on deposition of E. A. Darr, the following question, and requiring his answer thereto: "You did know, Mr. Darr, that Rulon D. Hair was involved in an accident with the R. J. Reynolds Tobacco Company truck on or about April 11, 1939, in which a man named Myers was killed?", to which appellant objected upon the grounds that the same was "incompetent, irrelevant, and immaterial. No foundation has been laid of character, * * * it is prejudicial to the rights of the defendants in this case" (R.220).

V.

The court erred in permitting appellees to read in evidence from the said cross-examination of E. A. Darr, the following question and requiring his answer thereto: "I believe a suit was brought against the R. J. Reynolds Tobacco Company with the same defendants in that particular case as are the defendants in this case?", to which appellant objected upon the grounds that it was "immaterial and incompetent, * * * not connected with any matter on direct examination, * * * prejudicial to the rights of the defendants" (R.221).

VI.

The court erred in permitting appellees to read in evidence from said cross-examination of E. A. Darr, the following question, and requiring his answer thereto: "Have you a record of the pleadings or the papers that were served on

the R. J. Reynolds Tobacco Company in that suit?", to which appellant interposed "the same objections" as to the preceding question (R.221).

VII.

The court erred in permitting appellees to read in evidence from said cross-examination of E. A. Darr, the following question and requiring his answer thereto: "You do not have a copy of the court pleading in that case?", to which appellant objected upon the grounds that it was "immaterial and incompetent, * * * not connected with any matter on direct examination, * * * prejudicial to the rights of the defendants" (R. 221).

VIII.

The court erred in denying appellant's motion to strike the answer to the preceding question, made upon the ground "that it is incompetent, irrelevant and immaterial and prejudicial" (R.222).

IX.

The court erred in permitting appellees to read in evidence from said cross-examination of E. A. Darr, the following question, and requiring his answer thereto: "Was that complaint served on the R. J. Reynolds Tobacco Company?", to which appellant objected "on grounds as made to the former question and that it deals with matters foreign to this suit * * *" (R.222).

X.

The court erred in permitting the appellees to read in evidence from said cross-examination of E. A. Darr, the fol-

lowing question, and requiring his answer thereto: "Mr. Darr, when did you receive a report as to the accident in April, 1939? April 11, 1939?", to which appellant objected "on the same grounds as heretofore stated" (R.222).

XI.

The court erred in permitting appellees to read in evidence from said cross-examination of E. A. Darr, the following question, and requiring his answer thereto: "Did you have an investigation made of that accident which resulted in the death of Mr. Myers?", to which appellant objected upon the grounds, "incompetent, irrelevant and immaterial * * * in addition to the previous objection stated" (R.223).

XII.

The court erred in permitting appellees to introduce in evidence on said cross-examination of E. A. Darr, appellees' Exhibit B, the same being a letter to Mr. Chas. C. Roe written by L. R. Donnelly, over objection of appellant "as incompetent, irrelevant and immaterial, prejudicial and not having to do with the issues or parties here" (R.224-226); also erred in denying appellant's motion to strike said Exhibit B, made upon the grounds, "there isn't a word in that letter that could be interpreted as having to do with this so-called waiver of instruction. It has to do entirely with the incident (Myers) that we have heretofore called to Your Honor's attention and it is wholly incompetent, irrelevant and immaterial" (R. 227).

XIII.

The court erred in permitting appellees to introduce in evidence on said cross-examination of E. A. Darr, over ob-

jection of appellant made upon the grounds that the same were "incompetent, irrelevant, immaterial and prejudicial," appellees' Exhibits C, a telegram to appellant from L. R. Donnelly; D, a letter to appellant from Chas. C. Roe; E, a letter to appellant from Chas. C. Roe; F, a telegram to appellant from Chas. C. Roe, and G, a telegram to Chas. C. Roe from appellant; also erred in denying appellant's motions to strike said exhibits, made upon the same grounds as urged against said Exhibit B (R.227-232).

XIV.

The court erred in permitting appellees to read in evidence from said cross-examination of E. A. Darr, the following question, and requiring his answer thereto: "Mr. L. R. Donnelly attended the preliminary trial in which Hair was indicted for manslaughter, didn't he?", to which appellant objected "as incompetent, irrelevant and immaterial and has no bearing on any issue in this case. It is prejudicial and not proper cross-examination" (R.233).

XV.

The court erred in permitting appellees to interrogate the witness E. A. Darr generally on various matters dealing with the Myers accident, to which, in each instance, appellant objected upon the grounds that the same was immaterial, irrelevant, and prejudicial (R.218-234).

XVI.

The court erred in permitting appellees to call L. R. Donnelly and interrogate him under cross-examination on matters dealing with the Myers accident, referred to in the cross-exam-

ination of E. A. Darr, over the objection of the appellant that the same was "incompetent, irrelevant and immaterial" (R. 264-266).

XVII.

The court erred in permitting appellees to interrogate L. R. Donnelly, under such cross-examination, touching a purported newspaper article claimed by appellees to have been published in the Pocatello Tribune and purportedly dealing with the Myers accident (R.265-266; 269-275), to which appellant objected upon the grounds that it was "incompetent, irrelevant and immaterial, * * * and prejudicial," and which objections were repeatedly made and overruled (R. 265-266; 269-275).

XVIII.

The court erred in permitting the witness L. R. Donnelly, under such cross-examination, to answer the following question propounded by appellees: "In the clipping that you sent did it contain a statement the same as the article you read here where the police claimed that this man was driving while intoxicated and that he was held on a drunken driving charge and that he was going to be arrested for manslaughter?", to which appellant objected upon the grounds, "as incompetent, irrelevant and immaterial and not the best evidence" (R.274).

XIX.

The court erred in permitting L. R. Donnelly, under such cross-examination, to answer the following question propounded by appellees: "You attended the trial in the District Court where Mr. Hair was tried under the indictment?", to

which appellant objected upon the grounds "as incompetent, irrelevant and immaterial * * * prejudicial" (R.275).

XX.

The court erred in permitting L. R. Donnelly, under such cross-examination, to answer the following question propounded by appellees: "You heard Mr. Pugmire testify that Mr. Hair was under the influence of intoxicating liquor and had been drinking when he struck Mr. Myers, didn't you?", to which the appellant objected "as incompetent, irrelevant and immaterial and not the best evidence * * * prejudicial." (R.276).

XXI.

The trial court erred in permitting L. R. Donnelly, under such cross-examination, to answer various and additional similar questions, propounded by appellees, touching the Myers incident, over appellant's objections that the same were immaterial, irrelevant, incompetent and prejudicial (R.276-282; 285-287).

XXII.

The court erred in permitting the witness Pugmire to answer various questions propounded by appellees touching the circumstances of the Myers accident, as detailed at R. 310-313, over appellant's repeated objections that the same were "incompetent, irrelevant and immaterial for any purpose."

XXIII.

The court erred in permitting the witness Pugmire to answer the following questions propounded by appellees: "Now, Mr. Pugmire, I will ask you, did you know the gen-

eral reputation of Rulon D. Hair in the community in which he lived during 1939, 1940 and 1941 for being a drunken, reckless driver or a sober, careful driver?", to which appellant made objection, "as being incompetent, irrelevant and immaterial and not having a proper foundation laid (R.314-315), to which question the answer appears at the top of R. 319.

XXIV.

The court erred in denying appellant's motion to strike the testimony of Mr. Pugmire touching the general reputation of Mr. Hair as a drunken, reckless, negligent, or incompetent driver, upon the ground that, as shown by cross-examination, the same was based upon three incidents, one of which was the Myers incident, one was the so-called Dubois incident, and the remaining one was the incident involved in the case being tried; that such incidents did not purport to give general reputation; that Pugmire's testimony was based upon reports that he had heard from police officers and not from the general public. (See objection, R. 327; testimony, 321-324; ruling, 491.)

XXV.

The court erred in permitting the witness Sid Close to answer the following question propounded by appellees: "What was that general reputation in your community as to whether or not he was a drunken, reckless driver or a sober, careful driver? Answer good or bad.", referring to Rulon D. Hair, to which appellant objected upon the grounds that it was "incompetent, irrelevant, and immaterial, * * * no proper foundation is laid, * * * and does not prove * * * any allegation of the complaint"; also erred in denying ap-

pellant's motion to strike the answer of said witness, made after cross-examination of him, upon the grounds that the same was "incompetent, irrelevant and immaterial" (R.328-335).

XXVI

The court erred in permitting the witness Buskirk to answer the following question propounded by appellees: "Mr. Buskirk, do you know the general reputation in your community of Mr. Hair, confining your answer to 1939, 1940 and 1941, in this community for being a drunken, reckless or sober and careful driver? Do you know that reputation?", to which objection was made upon the grounds, "as incompetent, irrelevant and immaterial and no proper foundation laid, * * * bad in form. No proof that any such information, if it existed, ever came to the defendants' knowledge"; also erred in denying appellant's motion to strike said answer made after cross-examination of said witness, made upon the same grounds and upon the further grounds that the answer was "not based on the general reputation in the community" (R.337, 441).

XXVII.

The court erred in permitting the witness F. M. Williams to testify concerning the general reputation of Avenell Newby as to her moral character, and that such reputation was good in the community in which she lived, over appellant's objection that the same was "incompetent, irrelevant and immaterial, and no proper foundation has been laid" (R.486); also erred in denying appellant's motion to strike said testimony after cross-examination, made upon the ground, "that there is no foundation * * * upon which any conclusion given

by the witness could be predicated" (R.487; ruling of court, 491).

XXVIII.

The court erred in admitting in evidence portions of plaintiff's Exhibit A, being part of the deposition of E. A. Darr, the same being a portion of a civil complaint filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, by Bertha Myers et al, against R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, following the Myers accident (R. 354-55, 357), over appellant's objection that the same was "incompetent, irrelevant and immaterial, and does not prove or tend to prove any issue in this case. We have spent more time trying the Myers case than the case at bar, * * * and prejudicial" (R.345, 346).

XXIX.

The court erred in admitting in evidence plaintiff's Exhibit No. 24 (R.348-351), being the prosecuting attorney's information and verdict of the jury, in the case of State of Idaho v. Rulon D. Hair, in Bannock County, Idaho, the same having to do with the Myers accident, over the objection of the appellant, that it was "incompetent, immaterial and irrelevant," (R.344) and that it is "not sufficient to establish or prove or brand this man as an incompetent driver. There is no foundation laid and it would be prejudicial." (R.347).

XXX.

The court erred in failing to grant appellant's motion for a directed verdict, made upon grounds that the evidence is

insufficient in law to justify the submission of the cause to the jury, more particularly as follows, to wit (R.488-490, 492) :

1. Insufficiency of the evidence to show that Rulon D. Hair was acting within the scope of his employment at the time of the accident, the evidence showing without conflict that at said time Hair was entirely upon a pleasure party of his own, and was transporting Avenell Newby with him as a guest to her home in Montpelier, Idaho.

2. The evidence conclusively shows that Avenell Newby was riding in said automobile as a guest of Rulon D. Hair, and that Hair had no authority from appellant or defendant Donnelly to haul guests in said car, but had positive oral and written instructions not to haul guests in said car, other than an employee or officer of the company; that the automobile was used in violation of such instructions; that the evidence is wholly and completely insufficient in law to show any waiver of these instructions on the part of either defendant Donnelly or appellant R. J. Reynolds Tobacco Company.

3. The evidence fails to show that at the time of said accident Rulon D. Hair was violating the guest statute of the State of Idaho or that he was guilty of reckless disregard of the rights of Avenell Newby, or of violation of any other of the requirements stated in said statute, providing for recovery of the guest suffering damage, and that he was not guilty of any such negligence required by the guest statute at the time of said accident.

4. The evidence fails to show that Rulon D. Hair was a careless, reckless, drunken or incompetent driver, or that he

was habitually negligent; that the one accident which may have occurred in Pocatello, Idaho, in 1939 is wholly and completely insufficient as a matter of law to establish his status of incompetency as a driver.

XXXI.

The court erred in denying defendants' motion for a directed verdict upon the question raised by appellees' paragraph numbered 7 of the Amended Complaint, wherein it was charged that Rulon D. Hair was permitted to use the truck of the defendants when it was alleged they knew him to be a careless, reckless, drunken and incompetent driver, upon the ground and for the reason that the evidence is wholly and completely insufficient to show, as a matter of law, that there was any incompetence or negligence shown in his use of automobiles as an habitual matter, and that said allegations are in no wise supported by the evidence, or that any such information, if any did exist, ever came to the attention of the defendants, and that said matters be removed from the jury by proper instructions and that the evidence attempting to bear thereon be stricken from the record; that said motion was made for consideration of the court in the event the motion for a directed verdict of the whole cause be denied (R.490-92).

XXXII.

The court erred in submitting this case to the jury without limiting the jury to a maximum recovery against said defendants of the amount theretofore rendered against Rulon D. Hair, and which became final judgment against the agent or employee, to wit, \$7,500 (R.110-12, 492-506).

XXXIII.

The court erred in denying appellant's motion for judgment notwithstanding the verdict, and in the alternative for a new trial, made upon the grounds of the insufficiency of the evidence, errors at law occurring at the trial, including the court's rulings on evidence, the instructions of the court given to the jury, to which exceptions were taken, and failure to give other instructions requested by appellant, all of which appear at length in said motion, and particularly in failing to instruct the jury that judgment of \$7,500 having been theretofore awarded against Rulon D. Hair, that the jury could not in any event return a verdict against the defendants in excess of said sum; misconduct of the jury and excessive damages appearing to have been given under the influence of passion or prejudice; all of which appears in full and at length in said motion (R.69-99; see court's ruling thereon R.100-101).

XXXIV.

The evidence is insufficient to justify the verdict and judgment thereon against this appellant, and is against the law, more particularly as follows:

(a) The evidence fails to show, at the time of the accident, that Rulon D. Hair was acting as an agent, servant, or employee of the appellant, or of L. R. Donnelly, but, on the contrary, it conclusively shows that he was not acting within the scope of his employment, but was engaged with Avenell Newby on a pleasure party of their own.

(b) The evidence is undisputed that, at the time of the accident, Avenell Newby was a gratuitous guest of Rulon D.

Hair, being transported by him contrary to positive written and oral instructions from the appellant, forbidding the hauling of guests, and the evidence is insufficient in law to prove a waiver of such instructions.

(c) That the Myers incident referred to in the testimony is the only incident of which the appellant had any knowledge that Hair had ever been involved in any accident, and that such evidence is wholly insufficient as a matter of law to prove Hair a reckless or incompetent driver on September 11, 1942, and that the submission of said issue to the jury was wholly without substantial evidence for its support; on the contrary, the evidence shows a high degree of competency and skill on the part of Hair, in the use of appellant's automobile.

(d) That the evidence relating to the Myers incident is wholly insufficient, as a matter of law, to show, prove or tend to prove any waiver or abrogation whatsoever of appellant's positive injunction to Hair, both oral and in writing, not to haul guests in said automobile.

(e) That the evidence relating to the Myers incident, which occurred over 3½ years before the Newby accident involved in this case, knowledge of which was brought to appellant's attention, and three or four other isolated instances of Hair's transporting guests, knowledge of which, the evidence shows, did not come to appellant's or defendant Donnelly's attention, is wholly insufficient to show an abrogation of appellant's positive instruction to Hair not to transport guests.

(f) The evidence is conclusive that Avenell Newby was a gratuitous guest of Rulon D. Hair, but fails to show that,

at the time of the accident, Hair was guilty of reckless disregard of her rights or otherwise violated the guest statute.

(g) The evidence is without dispute that, at the time of the accident, Avenell Newby was riding with Hair at her solicitation and request and that the two were engaged in a joint venture in which she assumed all risks incident upon said trip, and that she at all times was conscious and could observe Hair's conduct, and that she made no protest, but acquiesced therein, and she thereby became, and her heirs are now, estopped as a matter of law from asserting liability for damages.

XXXV.

The court erred in giving to the jury that certain instruction as follows:

"You are instructed that if you believe that R. D. Hair, who has been mentioned many times during the trial of this case as the driver of the truck, was a careless, reckless, drunken, incompetent driver, and that the defendants R. J. Reynolds Tobacco Company, and L. R. Donnelly knew, or by the use of reasonable diligence could have known that he was a careless, reckless and incompetent driver, or that he was acting as the agent, servant or employee of the R. J. Reynolds Tobacco Company or L. R. Donnelly, within the course and scope of his employment as these terms are defined for you in these instructions, then you would be justified in finding against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly." (R.495),

to which appellant took exception upon the grounds "that the same deals with an issue upon which there is no competent

or sufficient evidence justifying the submission of the said matter to the jury" (R.509).

XXXVI.

The court erred in giving to the jury that certain instruction as follows:

"You are instructed that the plaintiffs have alleged that the defendants were negligent in permitting Rulon D. Hair to use said automobile knowing him to be a reckless, drunken and incompetent driver. Before you can consider this charge against the said defendants it would be necessary for you to find from a preponderance of the evidence, first; that Rulon D. Hair was a careless, reckless, drunken and incompetent driver on the date of the accident, and, secondly; that such facts were known to the defendants, and before such matter can be considered by you it would be necessary for you to find that a reasonably prudent man, knowing the facts as shown by the evidence would reasonably conclude that he was of such character. In order that prior specific acts of negligence by a servant, agent, or employee should be sufficient to establish the master's negligence in retaining the servant in his employ, the action must be the result of such incompetence of such a character rendering the servant unfit to be retained in his position, and even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless, drunken and incompetent driver, yet, if such was not known, or by reasonable diligence could not have been known to the defendants they could not, nor either of them be held negligent in employing Rulon D. Hair or keeping him in their employment." (R.496-497),

to which appellant took exception upon the grounds "that the same deals with an issue upon which there is no competent

or sufficient evidence justifying the submission of the said matter to the jury" (R.509).

XXXVII.

The court erred in giving to the jury that certain instruction as follows:

"You are further instructed. that Rulon D. Hair cannot be charged with a reputation of drunken and reckless driving an automobile, unless you find that such a reputation was generally known among the populace of the community in which he lived and worked, in addition to the opinion in that regard of a relatively small class of persons. and that the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly cannot be charged with having known any such reputation of Hair unless it be shown that any such reputation was known to the defendants or either of them, or that Hair's acts of drunken or reckless driving, if any, were so flagrant. and committed so frequently and publicly that the defendants in the exercise of reasonable diligence should have known of any such reputation of Rulon D. Hair: further an opinion of a small group of persons. if you believe such opinion existed, cannot be reasonably expected to give notice of such fact to an ordinary business man. nor be sufficient to create a reputation." (R.499-500),

to which appellant took exception upon the grounds "that the same deals with an issue upon which there is no competent or sufficient evidence justifying the submission of the said matter to the jury" (R.509).

XXXVIII.

The court erred in giving to the jury that certain instruction as follows:

“The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that statute it is provided that it shall be prima facie lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State statute that it shall be prima facie unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities.” (R. 497),

to which appellant took exception upon the grounds that said instruction “is based upon a statute covering ordinary negligence in which automobiles are involved and does not have application in the instant case or to any case where the guest statute is involved and that the said instruction would tend to mislead and confuse the jury into considering a case in which this law is involved rather than cases involving the guest statute” (R.510).

XXXIX.

The court erred in giving to the jury that portion of a certain instruction as follows:

“The amount of damages, if any, which you allow

shall in no event exceed the amount prayed for in the plaintiffs' complaint" (R.504),

to which appellants took exception upon the grounds "that the plaintiffs in this case should not be allowed to recover more than \$7500, the same being the amount heretofore awarded against R. D. Hair as the agent, servant and employee of said defendant and that the jury should be so instructed with their instruction on damages" (R.511-512).

XL

The court erred in failing to give to the jury appellant's requested instruction No. 11, as follows:

"You are instructed that in respect to the issue as to damages, if you come to consider that issue, the court charges you as a matter of law, that in no event in this case can you award damages against the defendants in excess of the sum of \$7500."

appellant's exception being: "For the reason that this case has heretofore been tried before a jury as against these defendants and R. D. Hair as agent, servant and employee of said defendants with a joint verdict having been rendered of \$7500 from which judgment the defendants Tobacco Company and Donnelly appealed to the Circuit Court of Appeals, and R. D. Hair did not appeal, and that said Circuit Court of Appeals reversed the judgment as to the defendants Tobacco Company and Donnelly and remanded the matter for a new trial and a new trial has been had against the last named defendants and that the amount heretofore awarded against the said R. D. Hair servant, agent, and employee of the Reynolds Tobacco Company and Donnelly fixes the max-

imum amount for which any judgment could be rendered in this case" (R.512).

XLI.

The court erred in failing to give to the jury appellant's requested instruction No. 12, as follows:

"You are instructed that this cause has heretofore been tried and a verdict rendered against all of said defendants in the sum of \$7500. R. J. Reynolds Tobacco Company and L. R. Donnelly appealed said cause to the appellate court. Rulon D. Hair did not appeal. Said judgment was reversed as to R. J. Reynolds Tobacco Company and L. R. Donnelly and the cause was remanded for a new trial as against them. The Judgment against Rulon D. Hair was not appealed from either by him or by the plaintiffs. It therefore is final so far as Rulon D. Hair is concerned, and you are to decide this case upon the issues of whether or not R. J. Reynolds Tobacco Company and L. R. Donnelly are also responsible. In this respect, you are specifically charged that the judgment against the defendant, Hair, should not in any sense be taken by you as any evidence of any liability on the part of the Tobacco Company or L. R. Donnelly, but that you must decide the case, so far as liability may be concerned, or the lack of it, as though no previous judgment had been rendered. In this respect, however, you are definitely charged that in the event you should find against these defendants and determine to assess damages, you can not render a verdict in excess of \$7500. This does not mean that the verdict, if you find against said defendant, should reach said sum, but that you are authorized, if you find the plaintiffs entitled to recover against the Tobacco Company and L. R. Donnelly, to fix the amount in such sum as you may find said plaintiffs have been damaged by the acts of R. J. Reynolds Tobacco Company and L. R. Donnelly, not exceeding, however, the sum of \$7500,"

appellant's exception being "upon the same grounds and for the same reasons as set out in the objection and exception to the refusal to give instruction number 11" (R.512-514). See specification No. XL.

XLII.

The court erred in failing to give the jury appellant's requested instruction No. 18, as follows:

"You are instructed that where a gratuitous guest, riding in an automobile being driven by another, fails to protest against the driver's proceeding at an excessive speed, such conduct constitutes contributory negligence as to preclude recovery for injuries and damages occasioned by such excessive speed,"

appellant's exception being "upon the grounds and for the reason that the law of the State of Idaho is to the effect that the guest in the automobile is under the necessity of protesting and the failure to protest against the excessive speed, the conduct contributing to the accident, when such guest has an opportunity to do so, and this should preclude the recovery for injuries and damages by such conduct of the said guest" (R. 514).

XLIII.

The court erred in failing to give to the jury appellant's requested instruction No. 22, as follows:

"You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair had been drinking intoxicating liquor, and that the said Avenel Newby joined with him and also drank intoxicating liquor, and that the two of them were riding in said automobile while under the influence of intoxicating liquor, then and in that event you are

instructed that the said Avenel Newby assumed the risk of any danger or damage that might result from the use of intoxicating liquor and was contributorily negligent in her conduct, and under such circumstances, the plaintiffs cannot recover in this case,"

Appellant's exception being: "for the reason that the law of Idaho is to the effect if a guest participates and joins with the driver of an automobile in imbibing intoxicating liquor, the guest is equally liable with the driver and is contributorily negligent and assumes the risk of riding in said automobile and there is sufficient evidence in this case to require the giving of such instruction." (R.516-517).

XLIV.

The court abused its discretion in denying appellant's motion for a new trial, made upon the grounds therein recited including excessive damages given under the influence of passion or prejudice (R.69-96).

ARGUMENT

In the argument to follow, the specifications of error will be grouped and presented under headings designed to indicate the contentions of the appellant. The order of the points presented will follow, generally, the specifications. To avoid repetition, reference will be made to various errors without quoting them.

I.

PAYMENT OF COSTS PRIOR TO SECOND TRIAL WAS MANDATORY

(ERROR I)

At the conclusion of the first appeal the Circuit Court, pursuant to its mandate, adjudged that appellants recover against appellees their costs expended, taxed in the sum of \$704.12, and have execution therefor (R.46-49). Appellant and L. R. Donnelly moved the trial court for an order staying all further proceedings until the costs taxed were paid (R.48-49), which motion the court denied. Appellant, by its specification of error No. 1, assigned as error the refusal of the trial court to obey the mandate of the Circuit Court. The following quotation, taken from the case of *Bankers Securities Corp. v. Ritz Carlton R. & H. Co.*, (C.C.A.3d) 99 F. 2d 51, clearly illustrates the trial court's error:

“Our mandate in the case at bar directed that the appellants recover against the appellee \$341.60 ‘for their costs herein expended and have execution therefor.’ That meant that if they were not paid as and when costs are usually paid, execution might issue therefor. It did not mean that another suit between the same parties on the same cause of action might be started and costs in the first suit might be paid by

someone at some time at or after the conclusion of the second suit. It was not within the discretion of the District Judge thus in effect to set aside the mandate of this court in this regard. The direction of the Circuit Court of Appeals took the case out of the discretion of the District Court and made the payment compulsory."

See, also, *Weidenfeld v. Pacific Improvement Co.*, (C.C.A. 2d) 101 F. 2d 699.

II.

MOTION TO STRIKE AND MOTION TO ELECT (ERROR II)

After appellees were permitted to file their amended complaint, defendants moved to strike therefrom the following:

"Notwithstanding that all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile, and was in the habit of hauling guests contrary to instructions)) (R.25).

The court denied such motion (R.26). During the second trial appellees were permitted, over objections of appellant, to amend this clause by substituting the word "drunken" for the word "incompetent" (R.316-317).

It will be observed that Hair was not charged in the amended complaint with drunkenness at the time of the accident (R.21). The allegation, "the habit of hauling guests contrary to instructions," cannot under any circumstances be considered as a basis of negligence; at best it can be regarded only as an anticipatory item of rebuttal dealing with

a possible defense, which might be asserted, on one phase of the case.

After appellees had rested, appellant moved to compel them to elect upon which of the two theories they would rely for verdict (R.360), upon which motion the court failed to rule. Hair's alleged recklessness, which, appellant contends, utterly failed in proof, cannot be urged as a valid one. In its decision (145 F. 2d 768) this court said:

"We have not considered, and think it unnecessary to decide whether, on a proper state of facts, this theory is a valid one."

The two theories in the case necessarily lead to confusion. One is predicated on simple negligence, and the other on the geust statute. Furthermore, under the facts as heretofore detailed and hereafter argued, it becomes apparent that such theory in this case was wholly invalid.

III.

TRIAL COURT ERRED IN ADMITTING EVIDENCE AND REFUSING TO STRIKE TESTIMONY OF MYERS INCIDENT

(ERRORS III-XXI, XXVIII-XXIX,
XXXV-XXXVII)

This court, in its opinion at 145 F. 2d 768, said:

"We have concluded that the judgment must be reversed because of error in the reception of proof concerning Hair's previous record as a driver and because of the submission of that issue to the jury."

The court referred to proof relating to an accident in Poca-

tello in which Hair was involved, which "resulted in the killing of a pedestrian and in Hair's arrest on a criminal charge," which accident occurred "more than three years prior to the accident in which Mrs. Newby was fatally hurt." It appears definitely concluded by the Circuit Court that the reception of evidence, as proof of such matters, constituted fatal error, as did the submission "to the jury the issue of Hair's previous record."

Notwithstanding the decision of this court, about one-half of the record of the second trial is taken up with proof of the Myers accident. After appellees had introduced some evidence touching the accident in which Mrs. Newby was injured, they then began to introduce the cross-examination of A. E. Darr (R.214), taken on deposition prior to the time of the first trial. The original testimony of Mr. Darr on direct examination had not been introduced. The trial court by admitting that testimony permitted appellees, over objections of appellant, to bring out divers and various details of the Myers accident. A number of the questions asked Mr. Darr, to which appellant interposed objections, appear in Specifications of Error, Nos. III-XV. In the course of that testimony, appellees were permitted to introduce in evidence, over objections of appellant, Exhibits B, C, D, E, and F, all of which were inter-office correspondence dealing entirely with the Myers incident.

The trial court then permitted appellees to call, under cross-examination, L. R. Donnelly, and to ask him numerous questions touching his knowledge of the Myers incident. Appellant's objections thereto are set out in specifications numbered XVI-XXI. Donnelly was compelled to testify, over

appellant's objections, that he attended the preliminary trial "in which Hair was indicted for manslaughter"; that he had read newspaper articles touching the Myers trial; that he heard Mr. Pugmire testify that Hair was under the influence of intoxicating liquor when he struck Myers, and to answer numerous other questions of similar import. The court then permitted appellees, over appellant's objections, to introduce in evidence Exhibit A, being part of a civil complaint filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, by Bertha Myers et al, against R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair (Appendix "2"); also to introduce in evidence Exhibit 24, which is a certified copy of the prosecuting attorney's information and the verdict of the jury, in the case of State of Idaho v. Rulon D. Hair (Appendix "3"). See specifications numbered XXVIII and XXIX. Appellant objected continually to the introduction of such and frequently urged it was immaterial and prejudicial and, as appellant contends, contrary to the decision of the Circuit Court.

The trial court apparently attempted to justify the introduction of that evidence "on the question of knowledge to the Company as a waiver of the rule on hauling guests" (R. 219). But it is to be observed that most of this evidence had no connection whatever with the so-called waiver. The complaint in the Myers suit in the State Court (Appendix "2") and the criminal complaint and verdict (Appendix "3") make no reference to a guest, and hence their admission cannot be justified on this theory.

Furthermore, such evidence was utterly immaterial on the

theory suggested by the court, particularly at that stage of the proceedings. Whether or not Hair was in the habit of hauling guests was wholly immaterial in so far as his alleged negligence was concerned. Whether or not he was acting contrary to instructions in hauling a guest is evidence tending to establish appellant's position that Hair was acting outside the scope of his employment, and clearly was a matter to be asserted defensively. Obviously, before any such testimony was interposed or evidence offered in support of the employer's injunction against the hauling of guests, it was wholly immaterial and prejudicial to permit the introduction by appellees of any evidence touching the Myers incident or any other incident touching on the hauling of guests. In other words, the entire Myers incident, with all of its ramifications, was permitted by the trial court to be dragged in and heralded before the jury, apparently under the screen of showing a waiver of something which, to that point, had not been claimed. Furthermore, appellees knew that there would be no denial on the part of appellant that it knew of the Myers incident nor that it knew that Hair, at that time, had hauled a guest in addition to his wife; those facts were developed at the first trial.

Even if the evidence touching the Myers incident had been offered to show waiver of the instruction against the hauling of guests, it was, and is, wholly immaterial in this case. This is so because of the testimony of Mr. Donnelly (R.295-296; 303-304) and of Mr. Hair (R.381-382) that, after the Myers incident, there was a conference in a hotel in Pocatello between Donnelly, Roe, Hair, and his wife,

wherein Hair was emphatically advised that, if he was continued in the employ of appellant, he must thereafter constantly and always observe the rule of not hauling guests in the company's car and, that if such should ever occur again, he would be discharged promptly. He agreed to this. There isn't a scintilla of evidence in the record showing that the appellant ever knew, of Hair's hauling of a guest after the Myers incident.

Appellant commenced anew with Hair after the Myers incident. The agreement against the hauling of guests, relating to the car involved in the Newby case, was subsequently signed. To argue, therefore, that the hauling of a guest in the Myers incident could be pertinent in the instant case, arising 3½ years after the Myers incident, on the question of waiver of this injunction, is not only illogical but contrary to the subsequent agreement of the parties. On any theory, therefore, that testimony, particularly at the time it was offered, was wholly immaterial and highly prejudicial, and its effect was to inflame and prejudice the jury against appellant.

Notwithstanding the fact that the court presumably admitted such testimony on the theory of waiver, nevertheless, it instructed the jury on the alleged status of Hair as a reckless and incompetent driver. Those instructions, to which appellant took exception, are set out in Specifications of Error numbered XXXV-XXXVII. There was no additional evidence, anywise competent, touching Hair's status as a driver, not relegated to relatively the same position as in the previous trial, namely, that such evidence was wholly insufficient to

fasten upon Hair the status of an incompetent driver. This court, in its original opinion (145 F. 2d 768), aptly said:

"If this item of evidence had been excluded, the showing as regards the employee's prior known record would consist of a single incident, and the significance even of that is seriously in dispute. On the side of the employer it was claimed that the Pocatello accident was the result of the negligence of the pedestrian rather than of the driver; but even if the contrary be assumed it can hardly be thought that one instance of negligence is sufficient to brand a driver as careless or incompetent to the degree that his retention in service is thenceforward at the employer's risk. The frailty of this species of proof is notorious. See *Olson v. North Pac. Lbr. Co.*, C. C., 106 F. 298; *Guedon v. Rooney*, 160 Or. 621, 87 P. 2d 209, 218; *Pittsburgh Rys. Co. v. Thomas*, 3 Cir., 174 F. 596. It was error, therefore, to submit to the jury the issue concerning Hair's previous record."

IV.

TRIAL COURT ERRED IN ADMITTING AND REFUSING TO STRIKE TESTIMONY OF PUGMIRE, CLOSE AND BUSKIRK (ERRORS XXII-XXVI)

Appellees may argue that they introduced evidence tending to show Hair had a reputation as an incompetent driver. Appellees, attempting such proof, called as witnesses, R. M. Pugmire (R.309-328), Sid Close (R.328-335), Ben Buskirk (R.335-341), and Frederick Smullen (R.341-343), and interrogated them as experts touching Hair's reputation as a careless, reckless, or drunken driver. At the outset it will be observed that Close was a sheriff, and the other three were policemen. They were in a specialized group. They were not

people with whom the average individual would come in contact. Defendant objected to that type of testimony in each instance upon the ground that it was incompetent and no proper qualifications had been laid for its reception. See specifications numbered XXII-XXVI. Pugmire, Close, and Buskirk testified on direct examination that the reputation of Hair was bad. Smullen, who said that he was present at the time of the Myers incident and had lived in Pocatello for 28 years, testified on direct examination as follows:

“Q. Did you, or do you, know the reputation of Rulon D. Hair in this community as being a reckless, drunken driver, or a sober, careful driver? A. No.

Q. You don't know? A. No, sir.

MR. DAVIS: That's all.” (R.343.)

Smullen's testimony is highly significant in the light of other testimony attempted to be adduced.

Pugmire, on cross-examination, testified that his entire conclusion was based on the Myers incident and talk he had heard about Hair from officers at Dubois and the Newby incident. He was asked and answered the following question:

“Q. You have not heard anything bad about his driving automobiles on any other than those three occasions? A. That's right.” (R.322.)

He then attempted to justify his conclusion on comments he had heard from officers. He then testified as follows:

“Q. You hadn't the information from the general public? A. No, sir.

Q. You never heard anything from the general public touching the fact that Hair was a drunken, incompetent and reckless driver? A. Not that I recall.

Q. You have no information from the public at large that would lead you to testify as you have this afternoon? A. That's right.

Q. You never advised anyone that you had such information? A. No, sir." (R.322.)

The testimony of Close and Buskirk is similar to that of Pugmire. Close testified that he based his answer as to Hairs' reputation on what he himself had seen at Dubois. Upon motion of appellant, Close's testimony touching reputation was stricken (R.332-333). Appellees then attempted to reconstruct him but, appellant most earnestly contends, without effect. Appellant made a second motion to strike his testimony, which motion was "denied for the present" (R.335). Buskirk's testimony was similarly weak (R.335-341); at its conclusion, a motion made by appellant to strike his testimony was denied (R.341).

Outside of the Myers incident, the foregoing constitutes every bit of evidence, if it can be called evidence, attempting to support the theory that Hair was a reckless, incompetent, or drunken driver. Aside from the fact that such evidence is wholly insufficient to support such contention, appellant urges the following:

(a) Hair's status as an alleged incompetent driver could not be proved by reputation nor by the opinion of police officers. In *Pantages v. Seattle Electric Co.* 55 Wash. 453, 104 P. 629, the rule is aptly stated in syllabus No. 2:

“A witness cannot be permitted to give his opinion as to the competency of a person as an automobile driver, for the jury is as competent to draw an inference from the facts upon which such an opinion must be based as witness.”

To the same effect see:

State v. Kirby, 62 Kan. 436, 63 P. 732;

Hobson v. New Mexico and A. R. Co., 2 Ariz. 171,
1 P. 545;

Gier v. Los Angeles Consol. Elect. Ry. Co., 108
Cal. 129, 41 P. 22;

Cosgrove v. Pitman, 103 Cal. 268, 37 P. 232.

In Guedon v. Rooney, (Or.) 87 P. 2d 209, 120 A.L.R. 1298, it was held that the opinion of a police officer as to a driver's recklessness and drunken driving on previous occasions was inadmissible. In Shaw v. Skopp, 190 N.Y.S. 859, 198 App. Div. 618, it was held that an opinion as to incompetency of a driver to drive an automobile was inadmissible, such not being the subject of opinion evidence. See also Moulder v. State, 9 Ga. App. 438, 71 S. E. 682. In Moore v. Norwood, (Cal.) 106 P. 2d 939, at 942, the following rule is stated:

“Opinion evidence is never admissible upon a subject which is capable of direct proof and when the ultimate question can be otherwise ascertained and made intelligible to the tryer of fact. In other words, whenever the question to be determined is the result of the common experience of all people of ordinary education, or such result is to be inferred from particular facts, such inference must be drawn by the jury and not by the witness.”

In *Johnson v. Caughren*, 55 Wash. 125, 104 P. 170, the decision of the court is expressed in the syllabus, as follows:

“An opinion as to the incompetency of a servant to perform the duties for which he was employed being acquired from observing his conduct, or from knowledge of his experience or lack of it, which matters could be related to the jury substantially as they were observed by the witness, the jury was quite as capable of drawing just inferences therefrom as the witness, so it was the province of the jury to draw the inference.”

Under such a rule, obviously opinion evidence on the ordinary conduct of an individual is not admissible. Furthermore, such testimony, if admissible, would not prove that the appellant had knowledge thereof. This point is expressed in *Tucker v. Constable*, 16 Ore. 407, 19 P. 13, wherein it is recited in the syllabus:

“Where it becomes necessary to prove that the defendants had knowledge of a particular fact, proof that such fact was ‘generally known’ is not competent for that purpose.”

(b) The motion to strike the testimony relating to reputation should have been sustained. Appellant assigns as error the refusal of the court to strike the testimony of those witnesses after, on cross-examination, they had shown themselves to be without information sufficient to give an opinion. It is held in *Edwards v. Clark*, (Utah) 83 P. 2d 1021, that the testimony of a witness is no stronger than is shown by the cross-examination. In *Peterson v. State*, 90 Fla. 361, 106 S. 75, the rule is well stated in syllabus No. 2, as follows:

“Where it appears, from cross-examination of a

witness who had testified as to the general reputation of the prosecutrix as to chastity, that such witness had no knowledge of such general reputation, and bases his testimony thereto solely upon specific conduct, such as having seen the witness in questionable places on several occasions, and having arrested her once for 'loitering,' his testimony as to general reputation is shown to have been not legally predicated, and the granting by the court of a motion to strike all of the testimony of such witness is not erroneous."

V.

**TRIAL COURT ERRED IN REFUSING TO STRIKE
TESTIMONY OF WILLIAMS**
(ERROR XXVII)

Appellees called as a witness F. M. Williams to testify as to the general reputation of Avenell Newby in the community in which she lived. He testified that he was a Senator in the State Legislature and had known Avenell Newby in her lifetime. Over the objection of appellant that his testimony was incompetent, irrelevant, immaterial, and without proper foundation, he was permitted to testify that her general reputation in the community "was good so far as I know" (R. 486). On cross-examination he testified that what he meant was that he had never heard her character discussed by anybody in the community and just knew that she was a lady living in Montpelier (R.486-487). Appellant thereupon moved that his entire testimony be stricken upon the ground that there was no foundation of any kind or character upon which he could base his conclusion (R.487), which motion the court denied (R.491). The court seemed to entertain the erroneous view that Williams should have been cross-examined before

he gave his answer (R.487). Orderly cross-examination, however, could not accomplish such a purpose. The argument made and the authorities cited, *supra*, dispose of such erroneous view. It is abundantly clear from the authorities that such motion should have been granted. Here we have a State Senator, undoubtedly called because of the office he held, telling the jury that here was a good woman, when he knew absolutely nothing about her. His testimony could have had but one effect namely that of influencing and prejudicing the jury. The motion to strike such testimony should have been granted. See: *Peterson v. State*, 90 Fla. 361, 106 So. 75.

VI.

INSUFFICIENCY OF THE EVIDENCE TO SUPPORT THE VERDICT (ERRORS XXX, XXXI, XXXIV)

At the conclusion of the evidence, appellant moved for a directed verdict based upon the insufficiency of the evidence (R.488-491). This, the court denied, with the suggestion that the same matters could be subsequently raised (R.492). Thereafter appellant presented its petition on motion for judgment, notwithstanding the verdict, and in the alternative for a new trial and a motion for a new trial (R.69-96). This motion was denied.

This Court stated, preliminarily, (145 F. 2d 768) its views on certain controversial matters were predicated on the assumption that the showing on a second trial would not differ materially from the first. Because of the way in which the case was tried and the additional evidence adduced, appellant feels

it proper to argue the errors assigned. Appellees presented this case on two theories:

(1) That Hair was an agent of appellant, acting within the scope of his employment at the time Mrs. Newby was injured; and

(2) That he was a careless, incompetent driver, and that such fact was known to the appellant.

The motion for a directed verdict was presented to the entire case and then made independently as to the second point above stated. The trial judge was in doubt particularly as to the second point, as indicated by his comment: "I am inclined to think that the one allegation as to the employment of Mr. Hair knowing him to be a reckless, drunken and incompetent driver should not be submitted to the jury." (R.491). Later the cause was submitted on both points and the jury so instructed.

Under such circumstances, it is urged that, if the evidence fails to support the verdict on both theories, the same must be set aside. *Crowell v. Duncan* (Va.), 134 S. E. 576. Appellant will present this matter under three sub-headings:

1. Hair was not an incompetent driver.

Elsewhere in this brief, argument has been made touching this point. Notwithstanding approximately half of the evidence adduced was directed toward this matter, yet we have nothing more in reality than the Myers accident, three and one-half years before the Newby accident. The Myers incident, of course, was definitely held by this Court to be insufficient.

The only other evidence which appellees attempted to offer was the testimony of a sheriff and policemen as to what they thought about Hair. When that testimony is analyzed, it is reduced to a conclusion based upon the Myers incident, which alone was insufficient, and as to the witness Close, upon an incident which he claims occurred at Dubois, Idaho, which was likewise approximately three years before the Newby incident.

Aside from the fact that such testimony was given by these officers was immaterial and incompetent, as heretofore argued, the whole of it is totally insufficient upon which to predicate a verdict, particularly when it must be further shown that appellant had knowledge of it. Here the proof breaks down completely. If, for the sake of argument, it could be urged that such testimony touching reputation was proper, it is to be observed that in each instance it came from police officers and not from the general public; even here Policeman Smullen, who had had as much contact as any of the other officers with the Myers case, admitted frankly that he did not know whether Hair's reputation as a driver was good or bad (R.343).

It is significant that appellees did not call witnesses engaged in ordinary business affairs, or people with whom the appellant would likely deal. It is not customary for an employer to be in such contact with police officers that it might get such information, if, indeed, it existed. The fact that Donnelly was in the territory could not help under those circumstances, for he testified definitely that he had never heard anything improper touching Hair's conduct, from the date of the Myers accident (R.302, 478-480, 483). It is

significant that the jury did not find against Donnelly. In view of this testimony, it is earnestly contended that such matter should not have been submitted to the jury.

This matter is within the rule announced in the following cases: *Pittsburgh Rys. Co. v. Thomas*, 174 F. 591, wherein, at 595, the Third Circuit Court said:

“A man perfectly competent in all respects for the duty he undertakes to perform, may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence.”

Guedon v. Rooney, 87 P. 2d 209; *Olsen v. Northern Pacific Lumber Co.*, 106 F. 298.

It is therefore urged that the evidence completely fails to show, first, that Hair was reckless or incompetent as a driver and, secondly, that if such had been the case no knowledge thereof ever came to appellant. On the contrary, the evidence is positive that Hair distinguished himself as a competent driver and received safety awards therefor (R.245, 258-262, 412-414, Exhibits 20, 21, 22 and 27). To submit such matter to the jury, along with the other points, would not only lead to confusion, but may have been the precise point upon which the jury attempted to render its verdict.

2. Hair was not acting in the scope of his employment.

From about the hour of 9:30 p. m. on the evening of September 10, 1942, until about 4:20 p. m. on September 12, 1942 (R.390-395), Mrs. Newby and Rulon D. Hair were engaged exclusively on a party of their own. The party

was solicited by Mrs. Newby (R.385-389, 461-463). There is not a scintilla of evidence indicating the contrary.

Additional evidence was presented at the second trial touching this trip. Mr. Rasmussen testified that he first saw Mrs. Newby "out by the cabin" (R.450), where he and Hair were stopping, and that he rode with her and Hair and Mr. Higson up to the Aero Club that evening (R.451). He did not come home with them. The next morning he found no one had occupied Hair's room (R.452). He then went to Soda Springs and saw the panel truck in front of the Enders Hotel. He went up to Hair's room and Hair opened the door. He saw Mrs. Newby there in the bed (R.453).

Charlie Nichols testified that he was night clerk at the Enders Hotel, and that one night Hair came to the hotel and registered. He had a woman with him, and they went to the room and occupied the same room (R.372-373). He fixed the time as being just before the accident, which he heard of later. The register sheet of the hotel records for that night was missing (R.373). While Hair had stopped at the hotel before, he never had a woman with him at any other time (R.374). He admitted that he saw Nichols at the time he registered and had Mrs. Newby with him (R.394).

Hair's testimony then continues and is similar to that given at the previous trial. He and Mrs. Newby left the Aero Club in Montpelier and, at her solicitation, went to Soda Springs, arriving there at about 5:00 or 5:30 in the morning of September 11th, registered in one room, where they occupied the same bed and went to sleep, up until about 11:00 or

11:30 a. m. (R.416) ; then went down to the Oasis Club in Soda Springs, where each of them ate and drank and played slot machines (R.394-397). He then drove over to Grace to see Mr. Rasmussen to ask him to tell his wife that he would be late getting home to Pocatello, and thereafter drove to Montpelier to take Mrs. Newby home.

He was asked, and answered, the following questions:

“Q. Did you transact any business for the defendants at Grace on this trip? A. No, sir.

Q. Did you transact any business for the defendants at Soda Springs? A. No, sir.

Q. Your entire attention was given to this lady? A. Yes, sir.

Q. What did you do after you left Grace? A. Started to Montpelier.

* * * *

Q. What was your objective? A. To take Mrs. Newby home and get my baggage.

Q. And you drove to Montpelier? A. Yes, sir.

Q. Your first objective was to take Mrs. Newby home? A. Yes, sir.” (R.398).

Later he testified as follows:

“Q. At the time of the accident, were you on the business of the owner of the car? A. No, sir, I wasn't.

Q. Had you been for some time, probably since you picked her up at Montpelier the night before? A. No, sir.

Q. During the period of time from the time you picked her up on the evening of the 10th at Montpelier until the accident happened on the highway about four-thirty on the afternoon of the 11th, had you been doing any business for either of these defendants, the R. J. Reynolds Tobacco Company or L. R. Donnelly? A. No, sir.

* * * *

Q. You knew that you were not doing business for the Company and that you were out on a party of your own at that time? A. Yes, sir." (R.411-412).

From the testimony it becomes apparent, both from the answers to direct questions and the recitation as to what Hair was doing, that he did not perform one single item of business for the company during that entire time. It is highly significant that, notwithstanding this was the second trial and appellees fully knew the position of appellant and had had ample time to make investigation, they did not offer a single item of evidence contradicting this fact. Such argues with compelling force that no evidence existed which would tend to show Hair was engaged in any business of his master.

Appellees relied entirely upon presumptions arising from some evidence that the car belonged to appellant; that it had appellant's advertising on the panel doors; that it was traveling in the territory during business hours and had within it products of the Company and, that Hair made report (which was later explained, R.411-412) that he was on company business.

But a presumption does not amount to evidence. In Offord

v. Jenner's Estate, (Mo. App.), 189 S. W. 2d, 173, it is said that "the general rule is that when facts come in presumptions vanish". In *Witthauer v. Paxton-Mitchell Co.* (Neb.) 19 N.W. 2d 865, decided October 5, 1945, the court definitely rules that a presumption is not evidence. Such rule is well stated in the syllabus, as follows:

"The presumption that employee, driving employer's truck when accident occurred, was acting within the scope of his employment, disappears when evidence shows that employee was engaged in his own personal affairs, and the plaintiff is then required to show by evidence that the act of driving truck was within scope of employment."

Also,

"A presumption is not 'evidence' and will not prevent a directed verdict, when evidence rebutting it is convincing and undisputed."

The Idaho Supreme Court has held on several occasions that a presumption that an agent was within the scope of his employment simply because he had the master's car is definitely overcome by positive evidence to the contrary.

In *Willi v. Schaefer Hitchcock Co.*, 53 Ida. 367, 25 P. 2d 167, speaking of this presumption, the Court at 371 says:

"It is equally well settled that, where the evidence offered to establish facts which would rebut this presumption * * * are undisputed and uncontradicted, it becomes properly a question for the court."

Again, in *Magee v. Hargrove Motor Co.*, 50 Ida. 442, 296 P. 774, the Idaho Supreme Court affirmed the trial court in granting a nonsuit in favor of the owner of an automobile

whose employee was using the automobile on a pleasure trip of his own. The court says:

“Thus, if it be shown that the person driving the car was at the time of the accident an independent contractor, or an agent or servant of the owner but using the car for his own business or pleasure, the owner is not subjected to liability.”

In *Baldwin v. Singer Sewing Machine Co.*, 49 Ida. 231, 287 P. 944, this rule is again announced. In that case the court held that, where an employee was employed to sell sewing machines, and after a business trip made outside of the city he returned, parked his car, went to the company's office and, finding no one there, went to a cafe, had supper, did several errands and, on his way home struck a pedestrian, the employer was not liable, and that the presumption arising out of the use of the employer's car was definitely overcome. The same rule is again announced and followed in *Joslin v. Idaho Times Pub. Co.*, 56 Ida. 242, 53 Pac. 2d 323. The argument in every one of these cases is forcefully applicable to each and all of the other presumptions above referred to, and there is no Idaho authority to the contrary. There are other cases on some of these other points holding to the same effect.

In *White v. Firestone Tire & Rubber Co.*, 90 F. 2d 637, the Fourth Circuit Court considered a case where an employee was entrusted with an automobile owned by the company and to be used by the employee as a salesman. The automobile had printed on each door the word "Firestone". The salesman was using the car along the highway in the daytime to attend a football game. An accident occurred, and the court held that

the presumption of scope of employment had been overcome and, no testimony appearing to the effect that he was in the business of his master, the Firestone Company was held not liable.

It is to be noticed in the Firestone case that the three presumptions, involved in the case at bar, were present, namely: (1) Ownership of the car by Firestone Company; (2) Name of Firestone on the car doors, and (3) Driving along the highway during business hours.

In *Allen v. Ross* (Ark.) 138 S. W. 2d 409, a case almost identical with the one at bar, a tobacco company salesman was driving a company truck loaded with tobacco company products. He was traveling up and down the road in search of a woman companion. They had been on a pleasure trip together. The court held that the tobacco company was not liable. In that case, several of the presumptions here under consideration were present and completely overcome by the testimony as to what the man was doing.

In *Loucks v. R. J. Reynolds Tobacco Co.*, 188 Minn. 182, 246 N. W. 893, a salesman driving the company's truck, and whose duty it was to post advertising signs, left his work and went on a fishing trip. An accident occurred, and the court held the tobacco company was not liable. At page 896 the court said:

"We are of the opinion that, when Bagley took appellant's car on the trip from St. Paul to Pryor Lake, he was not acting as the agent and employee of the appellant within the scope and course of his employment, but, on the contrary, that he was a wrongdoer and appellant was not liable for his acts."

In the case of *Saltas v. Affleck* (Utah), 102 P. 2d 493, a driver of a grocery company truck made his last delivery about noon and then picked up two girls, whom he promised to give a ride into the business section of the city. On the trip he became involved in an accident. The court held that, when the driver picked up the girls, he departed from the course of his employment and the responsibility of his employer for his acts ceased as a matter of law.

In *Silva v. Traver* (Ariz.) 162 P. 2d 615, decided October 15, 1945, the court, with reference to the effect of the presumption above discussed, suggests that it may be "prima facie evidence" that the servant was using the vehicle in the business of the owner, but such is overcome by facts. On page 617, the court says:

"But 'prima facie evidence,' so called, is, strictly, no evidence at all. It is only a presumption of law. *Barton v. Camden*, 147 Va. 263, 137 S. E. 465. It has been uniformly so treated and denominated by this court. *Baker v. Maseeh*, supra; *Lutfy v. Lockhart*, 37 Ariz. 488, 295 P. 975. And such presumptions are mere arbitrary rules of law, to be applied in the absence of evidence. Whenever evidence contradicting a legal presumption is introduced the presumption vanishes. *Seiler v. Whiting*, 52 Ariz. 542, 84 P. 2d 452; *Flores v. Tucson Gas, Elec. L. & P. Co.*, 54 Ariz. 460, 97 P. 2d 206."

Appellees urged that Hair sent in to his employer two reports of the accident in which he said he was on company business. Those reports were not under oath. Hair clearly explained them. He testified that those statements were false (R.411). He understood that he would be fired immediately,

if the company knew of his conduct (R.382, 384, 390); hence those reports.

Concerning those reports, he was asked why he wrote "owner" in answer to the question, "Was the driver on own business or that of owner?" (R.411). His answer was that he understood that Mrs. Newby's condition at the hospital was favorable, and he did not want the company to know he had a guest with him or that he was not out on business of the company (R.412). In order to protect himself in his job, he made the false reports. This item therefore is completely overcome and explained by Hair's testimony and there is no evidence to the contrary. Hence there was nothing left to consider.

It is to be remembered that Hair was in nowise connected with the appellant when he testified. He had previously been discharged and had accepted a verdict of \$7,500.00 against him. He was as much an independent witness as any other witness that was called. But, even if it be considered that he was an employee of the company, nevertheless the court could not disregard his testimony.

It is held in *Chesapeake & O. R. Co. v. Martin*, 283 U.S. 209, 75 Law Ed. 983, that:

"In considering whether a demurrer to evidence should be sustained, the court is not at liberty to disregard the testimony of a witness, on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying counter-veiling inferences or suggesting doubt as to the truth of his statement, unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable."

See, also, *Pennsylvania R. R. Co. v. Chamberlain*, 288 U.S. 333, 77 Law Ed. 819 wherein it is held in syllabus No. 5: "A jury is not at liberty to disregard testimony because the witnesses are employees of one of the parties." Of course the same rule would apply to the court in considering the evidence on a motion for a directed verdict.

The Idaho Supreme Court, in *Magee v. Hargrove Motor Co.*, *supra*, speaking of overcoming a presumption of agency because of ownership of the car, says:

"And such presumption may be rebutted and overcome by evidence adduced during the trial by the testimony of any of the parties to the suit."

See, also, *International Co. v. Clark*, 147 Md. 34, 127 A. 647.

Surely there can be no doubt whatever in the mind of this Court that Hair was, at the time of the accident, and had been for hours theretofore, engaged in a party of his own, solicited and freely acquiesced in by Avenell Newby. A positive miscarriage of justice would result if appellant, who had previously given Hair employment, be compelled to respond in damages for Hair's highly improper departure from the services for which appellant had employed him.

3. Hair was outside the scope of his agency in hauling a guest contrary to instruction.

If, as we contend, Hair was entirely outside the scope of his employment at the time of the accident, it would make no difference whether he was hauling Avenell Newby contrary to instruction or whether that instruction had been

waived. The existence and violation of such instruction is merely another reason why he was not in the scope of his employment. In February 1942 the panel truck which Hair was driving at the time of the accident was turned over to him (R.248) and he entered into an agreement in writing which contained the following language:

"I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company's business as directed by my division manager. I understand that under no consideration am I to permit anyone save and except an employee of R. J. Reynolds Tobacco Company to ride with me in said car." (R.251).

When an employee using the employer's automobile hauls a guest contrary to such instructions he is definitely outside the scope of his employment and the master is not liable for injuries that may occur. See such cases as:

Chajnacki v. Dougherty, 254 Mich. 296, 236 N. W. 789;

Albers v. Shell Oil Co., 104 Cal. App. 733, 286 P. 752;

Hartigan v. Public Ledger, 291 Pa. 588, 140 A. 524;

Psota v. Long Island Ry. Co., 246 N.Y. 388, 159 N.E. 180;

Welch v. O'Leary, 287 Mass. 69, 191 N.E. 377.

Appellees contend that this instruction was waived because of the Myers incident and that Hair hauled other guests of which the Company knew, or might have known. How-

ever, the Myers incident can have absolutely no effect upon this instruction, and whether or not Hair was hauling a guest when that incident occurred is wholly immaterial. This is so because after the Myers incident there was a definite and positive understanding between Hair and appellant's supervisors that if this ever occurred again, Hair would be discharged immediately. There was no temporizing with this (R.382, 478). It cannot be argued that the previous offense could constitute a waiver when the definite agreement was later reached touching the enforcement of this matter. Thereafter, and over a period of 3½ years, appellees contend that Hair hauled three or four guests at various times and places. That such was not known to either Donnelly or the Company clearly appears from the testimony of Hair, Donnelly, and Darr. Hair testified that he made a mis-statement in his first report to the Company after the Newby accident, because he knew he would be fired if the Company learned that he had hauled a guest (R.412). Donnelly testified that the hauling of guests had never come to his knowledge (R.304, 478-479). Darr testified similarly (R.244-245, 256-257). No other agents of the Company were in the vicinity. The territory was large, and those derelictions, with the exception solely of the so-called Dubois incident, occurred within a very few days of the Newby accident. There is, therefore, a complete lack of evidence in the present case to show that such disregard was "notorious." The testimony is conclusive to the contrary. Appellant, therefore, most earnestly urges that the rule suggested in *Manion v. Waybright*, 59 Ida. 643, 86 P. 2d 181, touching waiver, does not apply.

It may be argued that there is at least a scintilla of evidence to support the appellees' theories. While appellant does not admit this to be true, yet, even if so, still the judgment cannot stand. In *Pennsylvania Ry. Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819, on page 825, it is said:

"The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned. *Schuykill & D. Improv. Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867, 872; *Marion County v. Clark*, 94 U.S. 278, 284, 24 L. Ed. 59, 61; *Small Co. v. Lamborn & Co.* 267 U.S. 248, 254, 69 L. Ed. 597, 600, 45 S. Ct. 300; *Gunning v. Cooley*, 281 U.S. 90, 74 L. Ed. 720, 50 S. Ct. 231, *supra*; *Ewing v. Goode*, *supra*, (C.C.) 78 Fed. 443, 444."

VII.

MAXIMUM LIABILITY OF APPELLANT

(ERRORS XXXII, XXXIII,
XXXIX, XL and XLI)

If it should be determined that appellant is liable in damages to appellees for the conduct of Rulon D. Hair, then such liability cannot in any event exceed the sum of \$7,500. Judgment for that amount against Hair became final, and the employer's liability in this case cannot be greater than that of the employee. This position of appellant was called to the court's attention when the trial commenced (R.110-113). When the court instructed the jury, it refused to recognize this doctrine. On the contrary, the court instructed the jury that "the amount of damages, if any, which you allow shall in no event exceed the amount prayed for in plaintiff's complaint" (R.504). The court permitted the jury to take the

pleadings to the jury room (R.493). The complaint contained a statement of the amount prayed for. Appellant excepted to that instruction, upon the ground that "plaintiffs in this case should not be allowed to recover more than \$7,500, the same being the amount heretofore awarded against R. D. Hair * * *" (R.511).

Appellant had previously tendered to the court requested instructions (R.491), among which were requested instructions Nos. 11 and 12, in each of which the court was requested to instruct the jury that, as a matter of law, the maximum amount of damages which could be awarded was \$7,500 (R. 512-513). The reason for these requested instructions was in each instance asserted. This error is raised by specifications of error Nos. XXXII, XXXIII, XXXIX-XLI.

It is a fundamental rule of law that an amount recovered as actual or compensatory damages, in a tort action against a person who was the active tort-feasor, is the limit of the amount recoverable as such damages against a person whose responsibility is solely derivative. In this case appellant's liability, if any, is because of the conduct of Rulon D. Hair, and its liability, if any, is purely derivative. Even if it could be successfully urged that appellant was negligent in employing Hair, such would not alter the rule, because it was Hair's conduct that caused the damage, but for which there could not have been liability.

The rule is clearly stated in Freeman on Judgments, Fifth Edition, sec. 469, P. 1031, as follows:

"* * * the rule is general and well settled that where the liability, if any, of a principal or master to

a third person is purely derivative and dependent entirely on the principle of respondeat superior a judgment on the merits, in favor of the agent or servant, or even a judgment against him, in so far as it fixes the maximum limit of liability, is *res adjudicata* in favor of the principal or master, though he was not a party to the action'."

The rule is stated in *All v. Delaware & H. R. Corp.*, 29 N.Y.S. 2d 439, on P. 441 as follows:

"To permit a plaintiff to have damage in a greater amount against a master for the act of the servant than was allowed against the servant for the same act and for the same result would be an incongruity, if, indeed, it afforded the master, in respect to ad-measuring damages, the equal protection of the laws of the state within the intent of Constitution, Art. I, sec. 11."

When the jury in the first case returned a verdict against the three defendants for \$7,500, the judgment rendered thereon, from which appellees did not appeal, clearly became an adjudication of the maximum amount of damages. Surely appellant is not accorded equal protection of the law if damages can be assessed in one amount against the servant and in greater amount against the master, when the master's liability is derivative, arising solely because of the conduct of the servant.

The rule is aptly stated in *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366, 141 A.L.R. 1164, in syllabus No. 1, as follows:

"A judgment in a tort action in favor of the agent or servant, or even a judgment against him in so far as it fixes the maximum limit of liability, is *res judicata* in favor of the principal or master whose liability, if

any, is purely derivative and dependent entirely upon the principle of respondeat superior, though he was not a party to the action."

Again, in syllabus No. 3, the rule is stated:

"A judgment against the servant, from which no appeal was taken, in a tort action against master and servant, is conclusive against plaintiff, in so far as it fixes the maximum limit of liability for which master may be held, upon a new trial after reversal of a judgment of nonsuit as to him."

In that case suit was instituted against the servant and corporate employer on a charge of negligence of the servant. The first trial resulted in a judgment of nonsuit in favor of the employer, and a judgment on verdict for \$1,000 against the servant. An appeal was taken from the judgment of nonsuit. There was no appeal from the judgment against the servant. The action was reversed and remanded for a new trial. Upon retrial, damages for \$5,000 were adjudged in favor of the plaintiff and against the defendant employer. The defendant, in apt time, had tendered a requested instruction as follows:

"In respect to the issue as to damages, if you come to consider that issue, the court charges you, as a matter of law, that in no event can you award damages in excess of the sum of \$1,000.00."

The court declined to charge the jury as requested, and the defendant excepted. The Supreme Court of North Carolina held this to be error, stating:

"This exception is the basis of the primary assignment of error on this appeal and presents this question: Can the master, under the doctrine of respondeat superior, be held in damages in an amount greater

than that assessed against the servant, or is the verdict and judgment against the servant conclusive and binding upon the plaintiff?

“The individual defendant and not the corporate defendant was the active tort-feasor. While it is true the appellant on the finding of the jury was negligent in the sense that the act of the agent, as such, is the act of or is imputed to the principal, it is, strictly speaking, liable only under the doctrine of respondeat superior. This is established by the verdict. It must pay the damages inflicted by its servant while he was about his master’s business and acting within the scope of his employment. The amount of these damages has been ascertained and fixed by a jury in an action to which plaintiff was a party. She did not appeal. May she now recover a much larger sum from the master?”

After discussing numerous cases bearing upon this point, the court concluded:

“We conclude, therefore, that the original judgment, in so far as it fixes the maximum limit of liability, is as to plaintiff conclusive, and that the defendant is entitled to its day in court with full opportunity to defend on each of the pertinent issues raised by the pleadings. It follows that the court erred in declining to instruct the jury as prayed by defendant.”

The State of California has a statute which limits recovery for death or an injury to person or property, resulting from negligence in the operation of a motor vehicle, to the sum of \$5,000.00. The California courts have uniformly held that no sum can be assessed against the owner of a motor vehicle or the master, in excess of that assessed against the servant or operator of the vehicle.

Kerrison v. Ungar, 135 Cal. App. 607, 27 P. 2d 927;

Bradford v. Brock, 140 Cal. App. 47, 34 P. 2d 1048;

Daniel v. Jones, 140 Cal. App. 145, 35 P. 2d 1098;

King v. Ungar, 35 Cal. App. 2d 192, 94 P. 2d 1040;

Sparks v. Berntsen, .. Cal. App. 2d .., 112 P. 2d 742.

In Bradford v. Brock, *supra*, on page 1050 it is said:

“The reason for the rule is obvious. If the detriment to plaintiffs caused by the operator of the car is found by the jury to be \$2,500.00, they should not be permitted to collect that sum from him and then go to the owner or employer, whose liability arises out of his relationship to the car or its operator, and not out of any independent act, and collect a further like sum, thereby obtaining double the amount to which plaintiffs are entitled under the jury’s decision.”

Among the many cases supporting this doctrine, see the following:

Betcher v. McChesney, 255 Pa. 394, 100 A. 124;

Holmboe v. Morgan, 69 Ore. 395, 138 P. 1084;

Stamos v. Portland Elect. Power Co., 128 Ore. 310, 274 P. 915;

Jenkins v. So. R. R. Co., 130 S. C. 180, 125 S.E. 912;

Johnson v. Atl. Coast Line Co., 142 S.C. 125, 140 S.E. 443;

Thomas v. Southern Grocery Stores, 177 S.C. 411,
181 S.E. 565;

Conway v. Kansas City Pub. Co., 234 Mo. App.
596, 125 S.W. 2d 935;

Romeo v. Western Express Co., 45 N.Y.S. 2d 297;

Feazle v. Industrial Hospital Assn. (Ore.) 103 P.
2d 300;

53 Am. Jur. page 461, Sec. 125.

This precise point has not been determined by the Supreme Court of Idaho. It will probably be argued that the case of Judd v. Oregon Short Line R. R. Co., 55 Ida. 461, 44 P. 2d 291, is contrary to this position, but an analysis of this case will remove this possible argument. In the Judd case, two verdicts were rendered, one for \$1.00 against a railroad engineer, and one for a larger amount against the railroad company. The railroad company appealed and the judgment was affirmed. There is no argument in the case on the theory of derivative liability. The court held that "appellant is not in position to object to the verdict on the grounds of informality or insufficiency in the present case, for the reason that it made no objection at the time to the submission of separate verdicts to the jury, nor did it object or except to the reception of the verdicts when they were returned into court".

In the case at bar, appellant took exceptions to the verdict (R.66) and, as heretofore pointed out, raised the point in several different ways. Furthermore, in the Judd case, the court comments upon the fact that the engineer was merely doing his master's business and could not profit in any way beyond his wages. At most this is dictum, but in the case at

bar this fact is lacking. Hair was definitely on a party of his own, and nothing which he was doing could be of benefit to the master.

Again attention is called to the case of *Judd v. Oregon Short Line R. R. Co.*, 4 Fed. Sup. 657, wherein this same case was remanded to the state court by Judge Cavanaugh, and in that opinion considerable is said concerning the allegations of the complaint. It is to be observed that, in addition to the allegation that the engineer failed to sound the whistle or ring the bell, there was alleged independent negligence on the part of the railroad company in the manner in which its roadbed was maintained and in permitting the public for seventeen years to use a road which came to an end upon its right-of-way, where it was necessary for cars to back around in order to get out. From those allegations of the complaint, it is entirely possible that the jury may have concluded that the principal negligence for which they awarded damages was the independent negligence of the railroad company, over which the engineer had no control.

In the *Judd* case the Idaho Supreme Court cites the case of *Strickfadden v. Green Creek Highway District*, 42 Ida. 738, 248 P. 456. An examination of that case shows conclusively that the question of derivative liability was in no wise involved. Here an action was brought by the plaintiffs against three commissioners of a highway district, the highway district, and its foreman, named Dasenbrock. The trial court granted a nonsuit as against the commissioners, and the jury returned a verdict against the Highway District but not against Dasenbrock. There was no fixing of liability upon the

agent, nor is there anything in the case from which it could appear that the liability of the Highway District was derivative.

In the case at bar we have an entirely different situation. Here Hair was using appellant's car for his own pleasure and the pleasure of Avenell Newby. To hold that, under such circumstances, the employer, innocent of any tortious activity, must be held for four times as much damage, is indefensible. The trial court, therefore, erred in instructing the jury that the amount prayed for in the complaint was the maximum liability rather than the amount of the judgment rendered against Hair, and in refusing to give appellant's requested instruction to this effect.

VIII.

ERROR IN INSTRUCTIONS (ERRORS XXXV-XLIII)

Elsewhere in this brief reference is made to errors in giving certain instructions. Other reasons for these errors are here asserted.

In specifications numbered XXXV, XXXVI, and XXXVII, the court instructed the jury on appellees' theory that the appellant hired Hair knowing him to be an incompetent and reckless driver.

Appellant took exceptions to each of these instructions upon the ground that there was no competent or sufficient evidence justifying the submission of such a matter to the jury. The court elsewhere in its instructions advised the jury that all items touching the Myers incident dealt merely with the

question of a waiver of instructions against hauling guests. There was no reason for this instruction when the injunction against hauling guests had commenced anew after the Myers incident. But, this leaves merely the incompetent testimony of the police officers heretofore argued as the sole and only basis justifying such instructions. Such testimony being, as we contend, entirely insufficient and immaterial, the giving of the three instructions complained of necessarily tended to influence the jury and prejudice appellant and was reversible error.

R. J. Reynolds Tobacco Co. v. Newby, 145 F. 2d 768.

The court gave an instruction, quoted in Error XXXVIII, to which appellant took exceptions, dealing entirely with the Idaho statute on simple negligence. This case deals with violation of the guest statute. This statute does not deal with simple negligence. An entirely different course of conduct is required before liability can attach than if the case were one of simple negligence. In effect, the court advised the jury that if Hair was driving "in excess of 35 miles an hour," it may consider him liable for the results which followed. That such is erroneous, we contend, is obvious. It eliminates entirely the guest statute. The fact that the jury was instructed as to what the guest statute meant cannot help the case because at best, if the jury construed the instructions as a whole, it would have two rules for determining liability. This court in its opinion on the first appeal says:

"This case is governed by the Idaho guest statute, sec. 48-901, Idaho Code, 1932, as amended."

Being governed by that statute, there can then be no excuse for an instruction of the character given in Error XXXVIII, and this very instruction may have decidedly influenced the jury. Appellant was not the driver of the motor vehicle and cannot, under the guest statute, be held to a greater degree of liability than the driver. The driver is not liable for simple negligence, but only for violation of the statute. See:

Gifford v. Dice, 269 Mich. 293, 257 N.W. 830;

Holmes v. Wesler, 254 Mich. 655, 265 N.W. 492.

The exceptions to the giving of the instruction quoted in Error XXXIX and the refusal to give the instructions quoted in Errors XL and XLI, all of which deal with the theory of derivative liability and supporting the principle that an employer can in no event be held in damages in excess of that of the employee, has been considered in the preceeding subdivision of this brief.

Appellant complains of the court's refusal to give its requested instructions Nos. 23 and 24, being set out in full in errors numbered XLII and XLIII. These requested instructions deal particularly with contributory negligence and the assumption of risk by Avenell Newby. When appellees amended their complaint and injected the theory of drunkenness into the case, they necessarily opened up the argument that if Hair was drunk, Avenell Newby knew it and, by riding with him and joining him in drinking, accepted the same responsibility which rested upon him. In French v. Tebben, 53 Ida. 701, 27 P. 2d 475, this precise matter is dealt with; at page 710 the Idaho Court says:

"We concede that there is ample evidence in the record from which it could have logically been found by the jury that Mrs. Tebben was under the influence of liquor at the time they entered the car to start home and at the time of the accident; that Mrs. French knew or should have known such facts; also that Mrs. French purchased the liquor which caused such intoxication, and that such intoxication contributed to the proximate cause of the injury. If Mrs. Tebben was intoxicated at the time and such intoxication was one of the proximate causes of the injury, and Mrs. French furnished the liquor to cause such intoxication, or knowingly was willing to ride with her while she was under the influence of liquor, then Mrs. French was guilty of contributory negligence. * * * The court properly instructed the jury in this regard, * * *."

If Hair was under the influence of intoxicating liquor, as urged by the appellees, Mrs. Newby knew it. She had been with him constantly for 18 hours. She too had been drinking. The evidence is silent as to who paid for the liquor, but that is immaterial. Appellees having thus injected this matter into the case and appellant having pleaded these defenses, it was certainly entitled, under the evidence, to these instructions.

IX.

A NEW TRIAL SHOULD HAVE BEEN GRANTED (ERROR XLIV)

Appellant moved for a new trial in addition to its motion for judgment notwithstanding the verdict (R.69-96). The motion was denied (R.100-101). The appeal was from the judgment and the order denying a new trial (R.101). The court's ruling on this point is assigned as error (No. XLIV). The grounds are set out fully in the motion.

It is recognized that ordinarily a denial of motion for a new trial is not reviewable except where there has been an abuse of discretion. It is contended in this case that such an abuse is apparent for the reasons heretofore argued in this brief. In addition, appellant urges that under the facts and circumstances disclosed, the verdict was grossly excessive. This question is reviewable. In *Department of Water and Power v. Anderson*, (C.C.A. 9th) 95 F. 2d 577, at 586, it is stated:

“Appellant also contends that the verdict was excessive. Although it was held in *Southern Ry. Co. v. Montgomery*, 5 Cir., 46 F. 2d 990, 991, that a Circuit Court of Appeals has ‘no jurisdiction to correct a verdict because it is excessive,’ the rule in this court is that the refusal to grant a new trial is ‘such an abuse of discretion as is reviewable by this court’ where the verdict is ‘grossly excessive.’ *Cobb v. Lepisto*, 9 Cir., 6 F. 2d 128, 129. See, also, *W. T. Rawleigh Co. v. Shoultz*, 3 Cir. 56 F. 2d 148. Compare *Louisville & Nash. R. Co. v. Holloway*, 246 U.S. 525, 529, 38 S. Ct. 379, 62 L. Ed. 867; *Fairmount Glass Works v. Coal Co.*, 287 U.S. 474, 481, 485, 53 S. Ct. 252, 254, 77 L. Ed. 439.”

In the case of *Cobb v. Lepisto*, 6 F. 2d 128, cited in the foregoing quotation, the court granted a new trial because the verdict was excessive. In the case at bar a verdict of \$30,000 was awarded against appellant, a corporate defendant. No verdict was returned against the defendant Donnelly. \$7,500 was the amount of damages previously awarded against Hair, the active tort-feasor. This award was for the death of a woman who had left her home and children, sought the

companionship of another man, and engaged with him in questionable conduct for a period of approximately 18 hours. While this unfortunate adventure naturally provokes a sympathetic forgiveness yet it cannot help but reflect upon her value to her husband and children.

Furthermore, consideration must be given to the peculiar circumstances attendant upon the trial of the case. Mr. Newby came into court in the uniform of the United States Navy at the time of the war with Japan (R.173). Newspaper reports played the matter up in the daily press, to which the jurors had access. Such headlines as "Machinist Flys from Saipan for \$100,000 Suit Retrial" R. 90), and the details of such trip were printed. Likewise, the Myers incident appeared frequently in the papers. One of the jurors had a newspaper in her hands as she sat in the jury box (R.94). In *Myers v. Cadwalader* (C.C. Pa.) 49 F. 32, in the syllabus it is said:

"Where, during a trial extending over several days, the jury separating after each daily session, leading newspapers in the city in which the trial was taking place published matter calculated to prejudice the jury against one of the parties, it will be presumed that the jury saw the matter published."

The ruling of the court was founded in the following:

"* * * it is incredible that, going out into the community they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss

it. Good ground, therefore, here appears for setting aside the verdict."

See also *McKiblen v. Philadelphia & R. Ry.*, (C.C.A. 3d) 251 F. 577.

The newspaper items are, of course, only one ground which appellant urges actuated the jury. It is necessary that the court review and consider the entire record, including war hysteria; a sailor in naval uniform trying a case, founded in claimed negligence, against a large corporation; the large amount of evidence introduced concerning the details of the Myers incident and opinions of policemen, all of which it is contended, was improperly admitted; comparison of the verdict rendered with that rendered at the conclusion of the first trial when the inflaming circumstances referred to were not present; the fact that Donnelly, who was Hair's immediate supervising employer, was absolved from all blame and liability by the jury; the various errors committed by the trial court in admission of evidence and instructions to the jury and refusal to give other instructions heretofore argued in this brief. All of the circumstances alluded to are compelling in the conclusion that the jury was improperly influenced, the verdict is excessive and appellant did not have a fair trial and, that the trial court abused its discretion in refusing to grant a new trial.

X.

CONCLUSION

In conclusion, appellant respectfully contends that the

trial court erred in each and all of the particulars hereinbefore recited and referred to and that the judgment against appellant should be reversed with instructions to dismiss said cause against appellant.

Respectfully submitted,

E. B. SMITH

Residence and Post Office Address:
Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residence and Post Office Address:
Pocatello, Idaho

APPENDIX "1"**Section 48-901 Idaho Code Annotated
As Amended by Chapter 160 of the
1939 Session Laws**

48-901. LIABILITY OF MOTOR OWNER TO GUEST. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his * * * *intoxication* or his reckless disregard of the rights of others.

APPENDIX "2"

Plaintiffs' Exhibit A

A part of deposition of E. A. Darr and being a portion of a civil complaint.

(R.354-355, 357)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF BANNOCK

BERTHA MEYERS; JACOB D.
MYERS, MARY HOLLY; HENRY
MYERS; IDA WOODS; BERTHA
PIEPER; EVELYN MEYERS HAN-
SON; LEONA WEIAND; GEORGE
MEYERS; ROBERT MEYERS and
MELBA DUNN,

Plaintiffs,

vs.

R. J. REYNOLDS TOBACCO COM-
PANY; L. R. DONNELLY and RULON
D. HAIR,

Defendants.

} COMPLAINT

* * * *

V.

That at all times hereinafter mentioned and particularly on the 15th day of April, 1939, between the hours of four and five o'clock in the morning of said day, the defendant Rulon

D. Hair was an agent, servant and employee of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly; that in connection with the employment of said defendant Rulon D. Hair as such employee of the defendant L. R. Donnelly and R. J. Reynolds Tobacco Company, it was part of the duties of the defendant Rulon D. Hair to operate and drive a certain motor vehicle, or truck, which said truck was a Chevrolet job delivery truck, and bearing Bannock County, Idaho, license Number 3A-41; that it was at all times hereinafter mentioned and particularly on the 15th day of April, 1939, at the hour of between four and five o'clock in the morning of said day, it was the duty of said defendant, Rulon D. Hair as such agent, servant or employee of the defendants L. R. Donnelly and R. J. Reynolds Tobacco Company, to haul, transport and have in his possession in said motor vehicle a stock or quantity of goods consisting of cigars, cigarettes, and tobaccos produced and manufactured by the defendant R. J. Reynolds Tobacco Company, and for sale by the defendant R. J. Reynolds Tobacco Company and L. R. Donnelly, through and by the defendant Rulon D. Hair, it being the duty of said Rulon D. Hair to drive and operate said truck and to haul said stock of tobaccos, cigarettes, etc., in said truck from place to place in Bannock County, Idaho, and in other counties throughout the southeastern portion of Idaho, said Bannock County, and other counties throughout the southeastern portion of Idaho being the territory allotted to the defendant, Rulon D. Hair by the defendant L. R. Donnelly, and R. J. Reynolds Tobacco Company within which to solicit orders and canvass the trade generally; that it was further a part of said defendant Hair's duty, as an em-

ployee of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, to post and distribute advertising materials and matters, advertising the goods, wares, and merchandise manufactured by said Tobacco Company and for sale by said defendant Donnelly and R. J. Reynolds Tobacco Company; * * *.

* * * *

WHEREFORE, plaintiffs pray judgment against the defendants and each of them for damages, and for costs of suit and general relief.

ANDERSON, BOWEN & ANDERSON,

Attorneys for plaintiffs.

Residence, Pocatello, Idaho.

Verified by Jacob D. Myers as one of the plaintiffs, before Clyde Bowen, Notary Public for Idaho, on June 14, 1939.

Summons issued June 14, 1939.

APPENDIX "3"**Plaintiffs' Exhibit No. 24**

(R.348-351)

Prosecuting Attorneys Information.

Examination Held.

In the District Court of the Fifth Judicial District of the
State of Idaho, within and for the County of Bannock

STATE OF IDAHO,

Plaintiff,

vs.

RULON D. HAIR,

Defendant.

PROSECUTING ATTORNEY'S
INFORMATION

C. M. Jeffery, Prosecuting Attorney in and for Bannock County, State of Idaho, who, in the name and by the authority of said State prosecutes in its behalf, in proper person comes into said District Court in the County of Bannock, State of Idaho on the 19th day of May, 1939, and gives the Court to understand and be informed that Rulon D. Hair is accused by this information of the crime of Involuntary Manslaughter which said crime was committed as follows, to-wit: That the said Rulon D. Hair on or about the 15th day of April, 1939, and before the filing of this information at Pocatello in the County of Bannock, State of Idaho, then and

there being, did then and there knowingly, willfully, unlawfully and feloniously drive and operate a motor vehicle upon a public highway, to-wit: The streets of Pocatello, State of Idaho, and particularly on East Center Street, at a point in the three hundred block of said street, carelessly and heedlessly in wilful and wanton disregard of the right and safety of others, without due caution and circumspection, and at a speed and in a manner so as to endanger and likely to endanger any person thereon, and at said time and place did then and there drive and operate a motor vehicle as aforesaid while under the influence of intoxicating liquor, and that by reason of the acts afore-alleged, the automobile driven by the defendant, as aforesaid, without malice, did strike one Jacob Myers, a human being, thereby inflicting upon the said Jacob Meyers mortal wounds from the effect of which he, the said Jacob Meyers, died.

All of which is contrary to the form, force and effect of the statute in such case in said State made and provided and against the peace and dignity of the State of Idaho.

That the said Rulon D. Hair on the 20th day of April, 1939, was brought before a committing Magistrate, to-wit: The Honorable William Hinckley, Justice of Peace, Pocatello Precinct, Bannock County, State of Idaho, to be examined on the aforesaid charge, according to law: and was then and there by the said Magistrate advised of his statutory rights in the premises.

Thereupon, the said Rulon D. Hair was by the said Magistrate in open Court duly examined on the aforesaid charge according to law, and was then and there by the said Magistrate held to answer said charge in the District Court of the

Fifth Judicial District, State of Idaho, within and for the County of Bannock.

C. M. JEFFERY

Prosecuting Attorney, Bannock County, Idaho.

State of Idaho, County of Bannock — ss.

I, Anna Keefe, Clerk of the District Court of the Fifth Judicial District, in and for the County of Bannock, State of Idaho, do hereby certify that the foregoing is a true and correct copy of the original information filed in my office on the 19th day of May, 1939.

In Testimony Whereof, I have hereunto set my hand and official seal this, the 19th day of May, 1939.

Clerk.

Deputy.

Names of Witnesses known to Prosecuting Attorney at the time of the filing of this Information: Dr. H. H. Hughart, Ray Swallow, Don Robinson, F. H. Smullen, Arthur P. Hall, Y. D. Black, L. F. McKinnon, Robert M. Pugmire, A. R. Decker, Lee Bellah, Guy Nelson, Beth Robbins, Gretta Chambers, Anna Keefe, Art Olson, Edna Locke, L. W. Cox, Tom Rush, A. L. Oliver.

Filed in open District Court and made a record of said Court this 22 day of May, 1939.

C. M. JEFFERY, Prosecuting Atty.

ANNA KEEFE, Clerk.

(Title of State District Court and Cause.)

VERDICT

We, the Jury in the above entitled cause, find defendant guilty as charged in the information and we the Jurors recommend all leniency possible.

J. P. JENSEN, Foreman.

(Endorsed) : Filed Dec. 3, 1939.

(Title of State District Court and Cause.) B 1591

Register No. B 1591

CERTIFICATE

I, Anna Keefe, Clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, hereby certify that the original files in the above entitled cause are on file in my office; that I have custody and control of the same and that the same are official records of the Fifth Judicial District of the State of Idaho, in and for Bannock County;

That the above and foregoing Prosecuting Attorney's information and verdict are true and correct copies of the originals on file in my office and that the verdict rendered is the verdict rendered upon the trial of the defendant, Rulon D. Hair, upon the charges set out in the Prosecuting Attorneys Information.

Dated this 16th day of March, 1945.

(Seal)

(Sgd.)

ANNA KEEFE, Clerk.

No. 11,137

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. J. REYNOLDS TOBACCO COMPANY

(a corporation),

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY ANN
NEWBY, both minors, by their guardian
ad litem, George H. Newby,

Appellees.

**On Appeal from the District Court of the United States
for the District of Idaho, Eastern Division.**

BRIEF FOR APPELLEES.

GLENN A. COUGHLIN,

Residence and Post Office: Montpelier, Idaho,

B. W. DAVIS,

Residence and Post Office: Pocatello, Idaho,

Attorneys for Appellees.

FILED

DEC 27 1945

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

R. J. REYNOLDS TOBACCO COMPANY

(a corporation),

Appellant,

VS.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY ANN
NEWBY, both minors, by their guardian
ad litem, George H. Newby,

Appellees.

**On Appeal from the District Court of the United States
for the District of Idaho, Eastern Division.**

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

Appellant's recital of the facts insofar as the evidence is concerned, sets forth generally, that portion of the record that they consider favorable to them.

The testimony naturally must be taken as a whole and it cannot be of any great value to quote an isolated answer here and there in the testimony of a witness.

(NOTE): All numbers herein contained, such as 417, refer to the number of the page of the printed record unless otherwise specifically stated.

The appellees submit that the record fairly shows evidence sufficient to go to the jury on the following facts:

That Hair was drinking and undoubtedly proceeding as a drunken, reckless driver at the time of the unfortunate accident; that he had hauled guests to the knowledge of the company repeatedly; that he was in the course of company business, being in his own territory, calling on his dealers; advertising his products during business hours; making a written report that he was on company business and generally conducting himself as he had been in the habit of conducting himself, while he had exclusive control of the car in the past.

There was brought home to the appellant, specific knowledge of Hair having killed a man while Hair was driving a company truck, when he was drunk; when he had a drunken companion with him and when he had whiskey in the truck, after attending night clubs and at a time of night when there was no possible excuse for him to be using the company truck. These facts were told directly to the division manager, Donnelly, by the Chief of Police of the City of Pocatello, which Donnelly specifically admitted. (R. 276.) The chief of police, Pugmire, so advised Donnelly:

“A. I advised Mr. Donnelly that Hair was under the influence of intoxicating liquor.” (R. 312.)

“A. I told him he had another young man in the automobile who was also intoxicated and that he had been charged with intoxication.” (R. 313.)

The general reputation of Hair was proven to be that of a drunken, reckless driver during the years 1939, 1940 and 1941. (Witnesses, Pugmire, Close and Buskirk.) It is objected that the officers secured their information as to the reputation entirely from other officers. That is the general purport of Pugmire's testimony, but Mr. Close testified he formed his opinion from information he received from different parties (R. 333), and under cross-examination, testified:

“Q. You never saw him driving an automobile under the influence of liquor?

A. Yes sir.” (R. 332.)

The witness Buskirk based his opinion on information and talk of the general public.

“A. Just general talk of the police officers and the public.

Q. Who of the public did you hear?

A. The general public.” (R. 339.)

That Hair, Donnelly and Roe realized that upon Hair's conviction of a manslaughter charge for drunken driving under the laws of Idaho, his license would be revoked. Hair and Donnelly discussed it and Roe recognized it when he suggested in his telegram that Hair be continued in the employ of the appellant until the outcome of the manslaughter trial was had. The record on this testimony is quoted infra.

SUMMARY.

The complaint of the appellees as amended at the trial, charges that Avenell Newby, the deceased, was riding as a guest of Rulon D. Hair, an agent of the Reynolds Tobacco Company, who was in the course of his employment at the time of the accident, and alleges in the alternative that the appellant retained Hair in its employ, knowing that he was a careless, reckless, drunken and incompetent driver.

The appellant, having admitted the agency and ownership of the automobile, it devolved upon the appellees then to prove:

1. That Avenell Newby, having been a guest, that the motor vehicle was operated with a reckless disregard of her right under the guest statute and that the appellant had waived its instruction to its agent concerning the hauling of guests.

2. That Hair, the agent, was acting for the company in the course of his employment and was on company business, or

3. That he was a careless, reckless, drunken and incompetent driver and that this fact was known, or by the use of ordinary and reasonable diligence, could have been known to the appellant.

If the appellees met the burden of proof upon them, then they were entitled to go to the jury, unless the specification of error relied upon by appellants, that the trial of the case could not proceed until the costs on the former appeal had been paid, is well taken.

I.

THE DEMAND THAT COSTS BE PAID BY THE APPELLEES BEFORE THE CASE PROCEEDED WAS ADDRESSED TO THE DISCRETION OF THE COURT AND THE DEMAND NOT HAVING BEEN MADE TIMELY AND APPELLANT HAVING WAITED TO MAKE ITS DEMAND, KNOWING THE CONDITIONS, IT WAS NOT ERROR FOR THE COURT TO PERMIT THE CASE TO GO TO TRIAL, ESPECIALLY WHEN THE APPELLEES, BOTH BEFORE AND AFTER TRIAL, OFFERED TO CREDIT THE AMOUNT OF THE COSTS ASSESSED ON APPEAL, TO THE PRESENT VERDICT.

Golden v. New York Ry. Co., 222 Fed. 348;

28 U.S.C.A., Sections 635 and 832;

Fisher v. Cushman, 99 Fed. (2d) 918;

50 U.S.C.A., War, Section 114;

Deodrich v. United States, 67 Fed. (2d) 318;

Land Oberoesterreich v. Gude et al., 19 Fed.

Supp. 1021;

Cloquet Lumber Co. v. Burns, 222 Fed. 857.

 II.

THE EVIDENCE WAS AMPLE TO SHOW A VIOLATION OF
THE GUEST STATUTE.

Section 48-901, Idaho Code 1932, as amended provides:

“48-901. Liability of Motor Owner to Guest. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by

his * * * *intoxication* or his reckless disregard of the rights of others.”

Manion v. Weybright, 59 Ida. 643;

R. J. Reynolds Tobacco Co. v. Newby et al., 145 Fed. (2d) 768;

George v. Stanfield, 73 Fed. Supp. 486;

Meissner v. Papas, 124 Fed. (2d) 723;

Brock v. Waldron, 14 Atl. (2d) 715;

Lionetti v. Coppola, 161 Atl. 797;

Bordonaro v. Senk, 147 Atl. 136;

Cleveland C. C. & St. Ry. Co. v. Loret, 68 Fed. 823;

Mescher v. Brogon, 227 N. W. 645;

Dawson v. Salt Lake Hardware Co., Ida., 136 Pac. (2d) 733;

Willi v. Schaefer-Hitchcock Co., 53 Ida. 367.

III.

UNDER THE FACTS THE QUESTION OF WHETHER APPELLANT HAD WAIVED ITS INSTRUCTION TO ITS AGENT WITH REFERENCE TO HAULING OF GUESTS, WAS FOR THE JURY.

The evidence is conclusive that appellant had waived the instructions:

Manion v. Weybright, 59 Ida. 643;

Reynolds Tobacco Co. v. Newby et al., 145 Fed. (2d) 768.

IV.

THE FACTS JUSTIFIED THE JURY IN FINDING THAT HAIR
WAS ACTING IN THE COURSE OF HIS EMPLOYMENT.

- Manion v. Weybright*, 59 Ida. 643;
Reynolds Tobacco Co. v. Newby et al., 145 Fed.
 (2d) 768;
Gale v. Independent Taxi Owners Ass'n, 84
 Fed. (2d) 249;
Young et al. v. Wilby Carrier Corp., 54 Fed.
 Supp. 912;
Mullens v. Ritchie Grocery Co., 35 S. W. (2d)
 1010;
Malloy v. Rosenbaum, 103 Atl. 882;
Bimm v. Forrest, 213 Fed. 763;
Vitelli v. Minutoli, 4 Pac. (2d) 818;
Schweinhaut v. Flaherty, 49 Fed. (2d) 535;
Black v. Coffin, 126 Pac. 871;
*School District No. 26 v. Baxter County Board
 of Education*, 35 S. W. (2d) 1013;
Trachtenberg v. Castillo, 257 S. W. 657;
Homan v. Borman, 19 S. W. (2d) 441;
Anderson, An Automobile Accident Suit, Sec-
 tion 563, page 657.

V.

THE EVIDENCE WAS SUFFICIENT TO GO TO THE JURY ON THE QUESTION OF THE NEGLIGENCE OF APPELLANT IN RETAINING HAIR IN ITS EMPLOY AFTER KNOWLEDGE OF HIS KILLING A MAN WHEN DRUNK AND AFTER THE TESTIMONY OF THE CHIEF OF POLICE, SHERIFF AND A POLICE OFFICER AS TO HIS REPUTATION.

Mitchell v. Churches, 206 Pac. 6;

Somerville v. Keeler, 145 So. 721;

Buckingham v. Gahbert, 163 N. E. 306;

LeBlanc v. Pierce Motor Co., 30 N. E. (2d) 684;

Pfaehler v. Ten Cent Taxi Co., 18 S. E. (2d) 331;

Chaney v. Duncan, 110 S. W. (2d) 21;

Tonis v. Eding, 273 N. W. 761;

Hala v. Worthington, 31 Atl. (2d) 844;

Gossett v. Von Egmond, 155 Pac. (2d) 304;

Elliott v. Harding, 140 N. E. 338, 36 A. L. R. 1128;

Anderson v. Daniel, 101 So. 498;

Laney v. Blackburn, 144 So. 126.

The following cases are of a special interest:

Mareas v. Fred Harvey, 146 Fed. (2d) 989;

Bock v. Sellers, 285 N. W. 437;

Seins Heimer v. Burkhardt, 122 S. W. (2d) 1063.

VI.

A MASTER WHO RETAINS IN HIS EMPLOY, A RECKLESS, DRUNKEN OR INCOMPETENT DRIVER, OR ONE WHO IS KNOWN TO HAVE DRIVEN WHEN DRUNK AND CAUSED SO SERIOUS AN ACCIDENT AS THE DEATH OF A PERSON, FOR WHICH HE HAS BEEN CONVICTED OF MAN-SLAUGHTER, IS LIABLE FOR THE RECKLESSNESS OF SAID EMPLOYEE.

Department of Water and Power of the City of Los Angeles v. Anderson, 95 Fed. (2d) 577.

“The officers of the Construction Company, however, were fully advised of Johnson’s propensities, that he did get drunk, that he was addicted to the use of liquor, and they were not justified in assuming that he would remain sober merely because the truck was put in his charge.”

Nicholson Const. Co. et al. v. Lane, 150 S. W. (2d) 1069.

“Incompetence, recklessness, and accident are so universally the sequel of drinking that an owner of an automobile is put on notice of what is likely to occur if he does not take active steps to prevent any one addicted to drinking from driving it. If he fails in the performance of this duty, he should suffer the consequences of his neglect.”

Crowell v. Duncan, 145 Va. 489, 134 S. E. 576, 582, 50 A.L.R. 1425.

“It was the duty of Crockett in the selection of Holt as his agent to use reasonable care to ascertain his competency to drive a car and the existence of habits which would make it unsafe to place so dangerous an agency in his charge. The owner owed a duty to the public to know something about

the character and habits of an employee in whose charge he placed an automobile. A rapid moving and heavy vehicle becomes highly dangerous when negligently operated. It is evident from the readiness with which Holt engaged in the drunken carousal so early in the morning that he must have been a man of inebriate habits and that Crockett in whose employ he had been for a year or more before the accident either knew or was charged with the duty of knowing this fact, which is further emphasized both by the continued employment of Holt after the accident for approximately a year and up to the time of the trial (whether longer or not, we are not advised * * *).

Crockett v. United States et al., 116 Fed. (2d) 646.

“The facts supported by competent evidence, both direct and circumstantial, and believed by the jury, as disclosed by their verdict, are that the employers actually knew that the employee ‘was occasionally a drinking man’; and the proof is, further, that while he did not get drunk in the daytime or while around the office of his employers, he did frequently get drunk in the evening and at night, and that he was known to the police force of the municipality, and to others who testified, as an habitual drunkard and that such was his general reputation. His employers had sufficient actual knowledge to put them upon inquiry which, if reasonably pursued, would have led to full knowledge.

The employers contend here that they had instructed the employee not to use the automobile except during business hours, and that the decedent was the guest not of the owners of the car

but solely of the drunken employee. We have already stated that the facts were sufficient to charge the employers with knowledge that the offending employee would frequently get drunk, and they are further charged with the contemplation of that which according to common knowledge a drunken man will likely do, that is, that such a man when under the influence of liquor will drive about in an automobile if one be available to him, without regard to orders; that he will seek company, that is, will invite another or others to ride with him; and that when driving in a drunken condition he is dangerous to all who are with him or in his vicinity."

Levy v. McMullen, 152 So. 899;

Russell Const. Co. v. Ponder, 186 S. W. (2d) 233;

Talbert v. Johnson, 99 Fed. (2d) 813;

Harrison v. Carroll, 139 Fed. (2d) 427;

Cleveland Nehi Bottling Co. v. Schenk, 56 Fed. (2d) 941;

Guedon v. Rooney, 87 Pac. (2d) 209, 120 A.L.R. 1298. See Note page 1311;

Reed v. Owens, 69 Pac. (2d) 265;

Priestly v. Skourup, 45 Pac. (2d) 852, 100 A.L.R. 916. See also 36 A.L.R. 1132;

Schweinhaut v. Flaherty, 49 Fed. (2d) 535;

39 *Corpus Juris*, pages 640 and 641, also 533 to 535;

Wishbone v. Yellow Cab Co., 97 S. W. (2d) 452;

Gardner v. Solomon, 75 So. 623;

Rocca v. Steinmetz et al., 214 Pac. 259;

Southern Pacific Co. v. Hetzer, 135 Fed. 276;

Lufty v. Lockhart, 296 Pac. 976.

It was admitted that Donnelly and Hair discussed the fact that Hair would lose his license to drive if convicted. (R. 440.)

“Driving While Under the Influence of Intoxicating Liquor or Narcotic Drugs—Penalty.—Every person who is convicted of a violation of Section 48-502 relating to habitual users of narcotic drugs and driving while under the influence of intoxicating liquor or narcotic drugs shall be punished by imprisonment in the county or municipal jail for not less than thirty days nor more than six months or by fine of not less than \$100.00 nor more than \$300.00 or by both such fine and imprisonment. On a second or subsequent conviction he shall be imprisoned in the state penitentiary at hard labor for not less than two years and not more than five. The commissioner shall revoke the operator’s or chauffeur’s license of the person so convicted, if any such license has been issued.”

Section 48-558, Idaho Code 1932.

“Report of Conviction to Be Sent to Department.—a. Every justice of the peace or police judge or court in this state shall keep a full report of every case in which a person is charged with violation of any provision of this chapter, and in the event that such person is convicted or that his bail is forfeited, an abstract of such report shall be sent forthwith by the justice of the peace or police judge or court to the department but this requirement shall not be deemed to make such court a court of record.

b. Abstracts required by this section shall be made upon forms prepared by the department and shall

include all necessary information as to the parties to the case, the nature of the offense, the date of hearing, the plea, the judgment, the amount of the fine or forfeiture, as the case may be, and every such abstract shall be certified by the justice of the peace, police judge or clerk of such police court as a true abstract of the record of the court.

c. Each clerk of any court of record of this state shall also, within ten days after any final judgment of conviction of any violation of any of the provisions of this chapter, send to the department a certified copy of such judgment of conviction. Certified copies of the judgment shall also be forwarded to the department upon conviction of any person of manslaughter or other felony in the commission of which a vehicle was used. The said department shall keep such records in its office, and they shall be open to the inspection of any person during reasonable business hours.

d. Failure, refusal or neglect to comply with any of the provisions of this section shall constitute misconduct in office and shall be grounds for removal therefrom.

e. The reports herein required to be made and certified shall be without fee."

Section 58-561, Idaho Code Annotated, 1932.

The facts as shown by the present record, bring the case within the following rule:

"A habit of negligence that is known, or that by the exercise of reasonable care would have been known, to a master, and notorious acts of negligence, such as those which cause collisions of

trains and the *DEATH OF PASSENGERS*, may render a servant incompetent and impose upon the master the duty of discharging him.

Specific acts of negligence of which the master has notice are conceded to be admissible to prove incompetence, and a general reputation for incompetence is admissible to show that the master, by the exercise of ordinary care, would have known of the incompetence of the servant."

Southern Pacific Co. v. Hetzer, 135 Fed. Rep. 276.

After incompetency has been shown knowledge of the master is provable by reputation.

Vanner v. Dalton, 159 So. 558;

Pittsburgh Railways Co. v. Thomas, 174 Fed. 591.

The Reynolds Tobacco Co. was charged, not only with the fact that Hair had the reputation as a drunken driver, but were chargeable with all information that came to them direct and regardless of whether he had such a reputation, if they had facts or by the use of reasonable diligence, could have learned the facts as to Hair's habits, they were bound by these facts.

Hair's reputation was not the only source of knowledge as to his habits of driving and they were charged with any other knowledge they may have had.

"A father who has reason to believe, from observation of a son's habits or otherwise, that son is a careless driver, must deny son use of automobile irrespective of son's reputation as driver."

Reid et al. v. Owens et al., 69 P. (2d) 265.

VII.

IT WAS WITHIN THE DISCRETION OF THE COURT TO DETERMINE WHETHER OR NOT THE EVIDENCE OF THE CHARACTER WITNESSES, CLOSE, PUGMIRE AND BUSKIRK, WAS COMPETENT AND ADMISSIBLE AND THE EVIDENCE WAS PROPERLY RECEIVED UNDER THE OVERWHELMING WEIGHT OF AUTHORITY.

“Where impeaching witness testifies that she knows reputation for truth and veracity of another witness, any lack of knowledge shown upon cross-examination goes only to weight of testimony, and not its competency.”

State v. Hooker, 170 Pac. 374, 99 Wash. 661.

“It is within the province of the court to say whether or not evidence is competent or admissible, but its weight and credibility are primarily for the jury. There is no more justification for the Court to assume the functions of the jury than there is for the jury to undertake to assume the duties of the Court. Sec. 4824, Rev. Codes, provides: ‘Upon an appeal from a judgment, the court may review the verdict or decision and any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken: Provided, that whenever there is substantial evidence to support a verdict the same shall not be set aside.’”

State v. Blanchard, 27 Ida. 500.

“Impeaching character witness after stating that he knows another’s general reputation and character, may say it is good or bad, or may volun-

tarily, without suggestion from counsel, amplify or qualify his testimony.”

State v. Hicks, 157 S. E. 851, 200 N. C. 539.

“Refusal to permit defendant’s witness to testify that state’s witness’ general reputation for truth and veracity was such as would not entitle him to belief on oath *HELD* error.”

Robertson v. State, 282 S. W. 587, 104 Tex. Cr. R. 85.

“Exclusion of evidence of impeaching witnesses after proper foundation is erroneous, in case question to impeaching witness is not so general as to introduce irrelevant and improper testimony.”

Nash v. Fidelity-Phenix Fire Ins. Co., 146 S. E. 726, 106 W. Va. 672, 63 A.L.R. 101.

Swafford v. United States, 25 Fed. (2d) 581 and 584;

Merrill v. United States, 6 Fed. (2d) 120 (9th Circuit);

Held v. United States, 260 Fed. 932;

Colbeck v. United States, 10 Fed. (2d) 401;

Nash v. Fidelity-Phenix Fire Ins. Co., 146 S. E. 726;

State v. Driver, 107 S. E. 189;

Spotswood v. Spotswood, 89 Pac. 362;

Dent v. State, 84 S. E. 584;

Crabtree v. Hagenbaugh, 79 Am. Decs. 325;

Cohen v. U. S. 291 Fed. 370;

28 R.C.L., pages 628 and 629;

Hinson v. State, 138 American State Reports, 119;

State v. Higgs, 259 S. W. 454;

Stacy v. State, 264 S. W. 967;

Ward v. State, 175 Pac. 557;

Marshall v. Carr, 118 Atl. 621.

“The four impeaching witnesses stated they resided in Caruthersville and had known the appellant for a number of years up to December 29, 1929, when the attempted robbery was committed. One witness said he did not know what appellant’s reputation was on or about that particular date; but in answer to the question, ‘Is that reputation good or bad?’ apparently, and in one or two instances directly, referring to the period up to December, 1929, all four answered ‘Bad.’ The questions and answers are a little vague but we can see no prejudicial error. There is nothing to show the testimony was limited to a period so remote as to destroy its probative force.”

State v. Scott, 58 S. W. (2d) 275, 90 A.L.R. 860.

VIII.

**WHERE GENERAL VERDICT IS RENDERED FOR A PLAINTIFF,
WHERE THE COMPLAINT IS BASED UPON DIFFERENT
ACTS OF NEGLIGENCE OR ON MORE THAN ONE COUNT,
THE VERDICT IS SUFFICIENT IF SUSTAINED UNDER
EITHER THEORY IN ABSENCE OF A MOTION OR REQUEST
ON THE POINT IN THE TRIAL COURT.**

The appellant, not having requested any finding on the question of the two theories of liability, cannot now first raise this question on appeal if the verdict is supported by proof, either, that the agent was acting

in the course of his employment or that the master knew him to be a reckless, drunken, incompetent driver.

Levy v. McMullan, supra;

Boomer v. Isley, 49 Ida. 666, 290 Pac. 405 and cases cited;

Judd v. O. S. L. R. R. Co., 55 Ida. 46, 44 Pac. (2d) 291;

Tannahill v. Lydon, 31 Ida. 608, 173 Pac. 1146;

Russell-Locke-Super-Service v. Vaughan, 40 Pac. (2d) 1090;

Kortz v. Guardian Life Insurance Co., 144 Fed. (2d) 676;

National Fire Ins. Co. v. School Dist., 115 Fed. (2d) 232;

Halla v. Worthington, supra.

Rule 49 of the Rules of Civil Procedure provides both for special verdicts and for a general verdict accompanied by answers to interrogatories. So much of subdivision (b) of said rule as is pertinent here, is quoted as follows:

“The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.”

The appellant did not request any interrogatory or interrogatories on the question of whether the jury found against appellant on the question of whether Hair was in the course of his employment or whether they found against appellant on the question of Hair being a reckless, drunken and incompetent driver, and

whether the appellant knew it. Not having requested any interrogatories or taken any exception to the Court submitting to the jury a general verdict, that question cannot now be raised.

“Defendant, desiring specific instruction on punitive damage, should especially request it, where both actual and punitive damages are recoverable.”

Crystal Dome Oil and Gas Co. v. Savic, 51 Ida. 409, 6 Pac. (2d) 155;

Lessman v. Auchustigui, 37 Ida. 127, 215 Pac. 450;

Joyce Bros. v. Stanfield, 33 Ida. 68, 189 Pac. 1104.

IX.

APPELLATE COURT CANNOT CONSIDER WHETHER VERDICT IS EXCESSIVE OR REVIEW THE SAME WHERE NEW TRIAL DENIED.

Cleveland Nehi Bottling Works v. Schenk, 56 Fed. (2d) 941;

Scott v. Baltimore & Ohio R.R. Co., 151 Fed. (2d) 61, decided August 14, 1945, Circuit Court of Appeals, Third Circuit;

Fairmont Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 53 S. Ct. 254, 77 L. Ed. 439;

Aetna Casualty & Surety Co. v. Yeats, 122 Fed. (2d) 350.

Under the Rules of Federal Procedure, denial of a motion for a new trial is not reviewable.

28 U.S.C.A., Section 391. See note 4 for annotations.

The authorities are overwhelming on this proposition. Even if the Court could or would consider the motion for a new trial as reviewable the showing as to the newspaper clippings complained of is totally insufficient.

Langer v. U. S., 76 Fed. (2d) 817;

Spreckles v. Brown, 53 L. Ed. 477, 212 U. S. 208.

X.

WHERE VERDICT IS RIGHT ON THE MERITS JUDGMENT WILL NOT BE REVERSED FOR ERROR IN INSTRUCTIONS.

Chicago, Milwaukee & St. Paul Ry. Co. v. Ross,

112 U. S. 377, 28 L. Ed. 787;

28 U.S.C.A., Section 391.

XI.

IT IS FUNDAMENTAL THAT THE GENERAL LAW OF THE STATE OF IDAHO CONTROLS THE COURT IN THIS CASE REMOVED FROM THE STATE TO THE FEDERAL DISTRICT COURT.

Erie R. R. Co. v. Tompkins, 82 L. Ed. 1188, 304

U. S. 64, 114 A.L.R. 1487.

At page 417 of 1 Fed. Rules Decisions, is found a treatise or lecture by Honorable Charles E. Clark, U. S. Circuit Court of Appeals of the Second Circuit, in

which he discusses the present Federal Rules of Civil Procedure and in discussing *Erie R. R. Co. v. Tompkins*, said:

“As everyone legally minded now knows, the Tompkins case denied to the national government any ‘general law’ outside of specific statutory or constitutional grants of power and admonished the federal courts to look to the state precedents for the basic law which they should apply except for those federal specialties definitely committed to them.

Now the policy of the new federal rules to establish a uniform flexible procedure for all the national Courts, one which may prove, as it already seems to be doing, to be a model for the various states, is certainly clear and definite. All matters of the operation of the business of the Courts should follow the one uniform model. Likewise the core of the Tompkins doctrine is similarly clear and specific. Throughout a given territory one law ought to prevail; and it is a blot on the idea of justice if two Courts operating in the same territory apply differing rules for litigants similarly situated, but allocated by chance to different Courts.”

XII.

IN IDAHO, IN AN ACTION AGAINST THE MASTER AND SERVANT WHERE THE DEFENDANTS ARE SUED AS JOINT TORT FEASORS, SEPARATE VERDICTS MAY BE RETURNED AGAINST THE SERVANT AND THE MASTER AND IN DIFFERENT AMOUNTS.

Browder v. Cook & Quane, 59 Fed. Supp. 675
(Ida.) ;

Judd v. O. S. L. Ry. Co., 55 Ida. 461, 44 Pac.
(2d) 291 ;

Strickfaden v. Greencreek Highway District,
42 Ida. 738, 769, 248 Pac. 456 and cases cited ;

Wallace v. Hartford Ins. Co., 31 Ida. 481, 174
Pac. 1009 ;

Alabama Great Southern Railway Co. v.
Thompson, 200 U. S. 206, 50 L. Ed. 441 ;

Judd v. O. S. L. R. R. Co., 4 Fed. Supp. 657 ;

Gale v. O. S. L. R. R. Co., 4 Fed. Supp. 657 ;

Gale v. Independent Taxi Owners Ass'n, 84 Fed.
(2d) 249 ;

8 Cyc. 804 ;

23 Cyc. 1470 ;

Hooks v. Vet, 192 Fed. 314 ;

Ohio Valley Bank v. Greenbaum Sons Bank &
Trust Co., 11 Fed. (2d) 87 ;

Myers Admx. v. Brown, 61 S. W. (2d) 1052 ;

J. I. Case et al. v. Haynes, 199 S. W. 787 ;

Custis v. Puget Sound Bridge Co., 233 Pac. 936

(it was held in this case that a complete ex-
oneration of the servant did not release the
master. The facts showed that the master
was negligent. If the master was negligent

in retaining Hair, a release of Hair would not release them);

Nashville C. & Lt. v. Byars, 67 S. W. (2d) 497;

Virginia Beach Bus Line v. Campbell, 73 Fed. (2d) 97.

The appellant does not contend there has been any satisfaction of the \$7,500.00 judgment against Hair and in the absence of full satisfaction, the Appellees may elect as to which judgment they will attempt to collect.

Huey v. Dykes, 82 So. 481;

Nugent v. Boston Causal Gas Co., 130 N. E. 488;

Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129;

Collard v. Delaware etc. R. R. Co., 6 Fed. 246;

Power v. Baker, 27 Fed. 396;

Albright v. McTighe, 49 Fed. 817;

Shainwold v. Lewis, 76 Fed. 839;

American Bell Telephone v. Albright, 32 Fed. 287, Cert. denied;

Western Coal Mining Co. v. Petty, 132 Fed. 603;

Bigelow v. Old Dominion Copper Mining and Smelting Co., 225 U. S. 111, 56 L. Ed. 1009, also see 24 L. Ed. 596.

The question is annotated and briefed in 27 A. L. R. 805, *Fitzgerald v. Campbell*, and in 65 A. L. R. 1083, *Verbacks v. Gillwan*.

See also:

Lewis v. Ingram, 57 Fed. (2d) 463, Cert. denied;

Virginia Bus Line v. Campbell, 73 Fed. (2d) 97, Cert. denied.

“Where one may bring action against joint trespassers severally, he may recover separate judg-

ments. If the judgments vary in amount, he may elect de melioribus damnis, but his election must precede acceptance of the satisfaction."

Western Coal & Mining Co. v. Petty, 132 Fed. 603.

XIII.

WHERE A VERDICT IS AGAINST ONLY ONE DEFENDANT,
ANY OBJECTION TO THE SAME MUST BE TIMELY MADE
AND ORDINARILY ONLY THE PERSON AFFECTED CAN
OBJECT.

In the present case no objection was made as to the form of the verdicts. Counsel for both sides were consulted, and the appellants, without objection, consented that the forms of verdict submitted to the jury, should be submitted, and made no objection upon this basis when they were rendered.

Judd v. O. S. L. Ry. Co., supra, and the cases cited;

Gaines v. Durham, 117 S. E. 732;

Washburn v. Douthit, 73 Fed. (2d) 23;

Wright v. Safeway Stores, 109 Pac. (2d) 542.

XIV.

**WHETHER CIRCUIT COURT OF APPEALS INTENDED TO
REVERSE THE CASE AS TO HAIR OR NOT, IS OF NO
CONSEQUENCE.**

Counsel for appellees is not fully convinced or satisfied under the authorities that the case was not reversed as to Hair.

Washington Gas Light Co., v. Landsen, 172

U. S. 534, 43 L. Ed. 543;

Albright v. McTighe, *supra*;

Spottswood v. Dernham, (Ida.) 85 Pac. 1108.

Certainly if the action is joint the appeal was as to all. If not joint, but joint and several, then appellees may have different judgments under the Idaho rule and appellant is also liable independently of the servant's liability for its negligence in continuing Hair in its employ.

XV.

**APPELLANT'S REQUESTED INSTRUCTIONS ARE NOT IN THE
RECORD AND WERE NOT CALLED FOR BY APPELLANT.**

Counsel for appellant had no way of knowing from the statement of the points relied on by the appellant, what particular specifications of error appellant would make. We now find that appellant specifies as error, the giving of instructions on the theory that Hair was a careless, reckless, drunken and incompetent driver on the ground that there was no competent evidence justifying a submission of this question to the jury.

Appellant's requested instructions on this phase of the case, to which they now object, to be specific: De-

fendant's requested instruction No. 6 is identical with the instruction set forth on page 27 of appellant's brief, under Specification of Error XXXVII., with the exception of three words, and their Specification of Error No. XXXVI., on page 26 is to an instruction given by the Court not in the exact language of appellant's request, but covering the matter thoroughly. A number of instructions given by the Court were adopted from appellant's requested instructions and appellant requested instructions on the question of waiver; of whether Hair was in the course of his employment; on the question of repudiation and on the question of his being a careless, reckless, drunken and incompetent driver and they cannot now complain that the Court instructed the jury upon these theories.

Subdivision (h) of Rule 75 of the Rules of Civil Procedure, provides:

“Power of Court to Correct Record. It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court.”

Counsel for appellees could have had no way of knowing what particular specification of error the appellant would rely on or set out, and if the matter cannot be decided without considering the point here raised, then certainly the Appellate Court will direct that appellant's requested instructions or such of them as is necessary to determine their position, be printed.

XVI.

EXCEPTION TO VERDICT.

Appellant repeatedly calls attention to the fact that it excepted to the verdict. The record on this exception is found on pages 66 and 67 and shows that there is no valid exception taken or made. The entire record on this is as follows:

“Thereupon, E. V. Smith, Esq., counsel for defendant took exception to the verdict of the jury.”

The minutes set out precisely the entire proceeding. Appellant did not state upon what grounds it excepted to the verdict and made no statement whatever and took no exception whatever, except to state their exception in the following words:

“We except to the verdict.”

It is impossible to ascertain from the record who Mr. Smith, one of the counsel for appellant, was excepting for when he excepted to the verdict. Was it for Donnelly or was it for the Reynolds Tobacco Co.?

We submit that the case of *Wright v. Safeway Stores*, 109 Pac. (2d) 542 is squarely in point on the facts and the law. Up to the present time, neither Donnelly nor the appellant have requested the trial Court to take any action whatever, and furthermore, Darr, the Treasurer of the appellant and Donnelly, both having testified positively that the truck did not belong to Donnelly and that although the license for the same was taken out in Donnelly's name, it was done for convenience; the appellant cannot object that the jury apparently believed them and the jury apparently thought there was no basis for holding Donnelly if he did not own the truck.

ARGUMENT.

We will endeavor to follow the points or propositions set forth in the summary in this brief in the order there contained, insofar as the propositions therein set forth and relied upon, are argued specifically, and the following Roman numerals correspond with the numerals in the summary in this brief and contain the arguments of appellees on the propositions set forth in the summary.

I.

The Court did not abuse its discretion in permitting the trial to proceed without requiring appellees to pay the costs of the previous trial. Mr. Newby's affidavit under the statute, either as to being a poor person or as to being entitled to relief from collection of the

judgment under the Soldiers' and Sailors' Civil Relief Act, was not denied. The appellant had had ample notice of the setting of the trial and the conditions and circumstances upon which Mr. Newby would be permitted a leave from the service. To have denied him the right to proceed with his trial under such circumstances would have not only been contrary to the statutes cited, but would have been a harsh and unjust ruling. The District Court was familiar with all of the circumstances and there being no dispute as to the fact, the Court will surely not reverse this case upon that ground.

II.

A fair examination of the evidence will show that there is really no serious dispute as to the ultimate facts in the case. Avenell Newby was a guest and it is so alleged in the complaint. Hair was drunk and driving as a drunken driver, careening back and forth across the road in such a manner as to show both intoxication and utter recklessness. In his testimony, he admitted, after having carefully examined the exhibit showing the course of the truck, that the exhibit fairly represented the same. (R. 444.) He made the statement immediately after the accident to the witness, McGuire:

"That he was drinking and driving too fast" (R. 167) and he made no denial of that statement.

III.

The appellant had instructed Hair not to haul guests. Appellant knew definitely that Hair had hauled three guests, his wife and daughter and a drunken guest, Mr. Eckersley, at the time of the Meyers incident. The treasurer of the company had acknowledged this fact in a telegram and stated it was his disposition to get Hair's resignation. (R. 231.) Thereafter, Hair continued to haul guests repeatedly, and what is more, he hauled them when on company business. (R. 437, 417, 418 and 421.) Furthermore, Donnelly stated to George Newby:

"My God, you have had another woman with you this time, too." (R. 177.)

Donnelly made similar statements to other witnesses. It cannot be fairly contended that this was not a question for the jury.

IV.

The evidence justifies a finding that Hair was acting for the appellant in the course of his employment. It was a part of his business to advertise the products of the company and to call on the trade. The Aero Club was one of his customers (R. 425) and he called on customers of this kind, either during the day or at night time.

"Q. These night clubs or cafes that operate at night, were these your customers in your territory?

A. Well, any place that carries tobacco is considered a customer. However, I don't call on

dealers that just sell cigarettes. I wasn't interested in selling cigarettes so much.

Q. If you call on these customers and if they want any of your products you will sell them won't you?

A. Yes, sir.

Q. Whether it was at night or in the day time?

A. Yes, sir." (R. 478.)

"Q. You visit customers in order to do just general work even when you didn't sell them?

A. Yes, sir.

Q. It was part of your business to call on them and tell them hello, whether you sold them tobacco or not?

A. Yes, sir." (R. 425-426.)

"Q. If anybody had asked you for tobacco on the 11th day of September, that is the day of the accident, you would have sold it to them, would you?

A. Yes sir." (R. 425.)

The Club at Soda Springs was a customer of his, in his territory and on the day of the accident, he called upon one of his dealers in Grace, apparently to say "hello".

"Q. That was one of the dealers you regularly dealt with?

A. Yes sir." (R. 423.)

The attempted explanation of this call, that Hair was looking for Rasmussen, to tell him what to tell his wife, is an afterthought; a matter of necessity, and completely destroyed because Hair had already told

Rasmussen in Soda Springs, to tell his wife that he would be late getting home. (R. 453.) Why would Hair go to Grace to tell Rasmussen the same thing he had told him several hours before? In addition, Hair was hauling the company products; was in his own territory; it was his duty to advertise and to place the advertising material. He stated in two reports that he was on company business. The second report was a corrected report made in Mr. Donnelly's presence.

V-VI.

The evidence with reference to the appellant's knowledge of Hair's drunken driving and his reputation, is materially different from that on the first trial. Again, the evidence is practically undisputed. There is no serious controversy on the facts unless such controversy is raised by the number of objections registered in the course of the trial. There is no dispute as to the knowledge that was brought to the company concerning the Meyers incident. The record shows Hair was openly violating his instructions in hauling guests; that he hauled three that evening, his wife, daughter and Eckersley. He was driving the truck to the night clubs. He and Eckersley were both drunk and had a bottle of whiskey in the company truck. The only witness who even feebly attempted to deny this, was Donnelly, who was not present. The Chief of Police, an experienced officer, advised Donnelly of this. Donnelly heard the police later testify to these facts, and so advised an officer of the company, Mr. Roe. It is significant that Hair never denied any of the facts; did not deny his drunkenness at that time and while

Mr. Donnelly gave hearsay testimony that Dr. Hughart did not think Hair was intoxicated, Dr. Hughart, who was in Pocatello and who is now a practicing physician there, and was so at the time of the trial, was not called as a witness. Hair was convicted of manslaughter, having been charged with drunkenness. Three officers testified that his general reputation was that of a reckless, drunken, incompetent driver. The appellant recognized the seriousness of the matter and in a telegram, Mr. Roe interceded with Mr. Darr, the treasurer of the company, to let Hair continue until after the trial.

“Hair is out on bond. Trial will be next month. Donnelly thinks he will come clear. Would you consider him to continue until outcome is known? Donnelly regrets losing Hair due to his sales ability and past results. If possible would recommend we let Hair continue. Can have car repaired for small expense for time being. Wire instructions.”
(R. 231.)

The appellant knew that if Hair was convicted he should be discharged, and knew that his license would be revoked under the Idaho statute, and later knew that he was convicted and went to the expense of having Mr. Donnelly attend his trial in the District Court where Mr. Donnelly consulted with Hair's attorney concerning his defense.

Mr. Hair was later seen intoxicated while operating the company truck, by Sid Close, the sheriff in Clark County. He was seen by witness Pugmire operating the car on two occasions when there was something wrong with him. The Court would not permit Mr.

Pugmire to state what was wrong. Hair continued to violate company instructions with reference to hauling guests. He hauled women repeatedly and was seen with them by Mr. Close, and each time a different woman. Mr. Donnelly mailed to the company, the local newspaper report of Hair's intoxicated condition, his actions and the claims of the police at the time he killed Jacob Meyers. The local newspaper, of course, was the Pocatello Tribune, and Mr. Donnelly took exception to the report. He did not care to take cognizance of the drunkenness of Hair even though told specifically by the Chief of Police that he was drunk and that he had whiskey in the car. Mr. Roe did not care to take cognizance of it and neither did Mr. Darr who received the clipping from the local paper. Mr. Donnelly's testimony in relation to his activities in Pocatello, was so evasive, so unsatisfactory, so contradictory, that the jury was entitled to disbelieve every word he said, if they cared to. He even caused the Court to remark in the absence of the jury:

“Although I will admit that I was not very much impressed by his testimony in that regard and am saying this in the absence of the jury.” (R. 353.)

And the Meyers incident is referred to as one incident that did not give any notice and was trivial. It was an outrage upon society and cost the life of an innocent man and was notice to the appellant that Hair was a drunken driver, a violator of instructions and not to be trusted.

Hair and Donnelly put Hair's reputation squarely in issue by their testimony and their attempts to prove him a capable driver. Donnelly investigated his reputation and testified to this fact, but did not call a single person that he talked to or investigated it with, to the stand:

“Q. You made trips periodically over that territory after the Meyers incident in 1939?

A. That's right.

Q. On these trips you inquired of people and endeavored to find out what Mr. Hair's reputation was for driving?

A. That is correct.

Q. Did you make inquiry in Pocatello?

A. Yes sir.

Q. Did you make inquiry in Clark County?

A. Not that I remember.

Q. Did you make any inquiry of Mr. Pugmire, the Chief of Police in Pocatello?

A. I could have.” (R. 481-482.)

Donnelly and Hair were bosom friends as shown by the testimony and as shown by their actions. They spent vacations together and Donnelly went to Hair's home for his meals.

There can be little doubt that Donnelly made the statements credited to him by Newby and the Teuscher boys. He did not even half-heartedly deny them. He stated he could not trust Hair and had gotten him out of the same scrapes before. What were the same scrapes? They were either scrapes hauling other women contrary to instructions or scrapes over driving when drunk, and it can make no difference which

they were, that put Donnelly and the company on their notice.

It is argued that Hair had a good record for three years. Yes, he did not kill anyone in that time and there are millions of drivers who have not killed anyone at all, and we wonder if any of the appellant's other salesmen have killed anyone at all. How many times is it necessary for a servant to kill someone while he is drunk and disobeying company instructions before the master has notice? We can hardly conceive that the Courts can regard such an occurrence, or are willing to hold that it is, in the nature of a minor or trivial incident, that does not give notice to the company.

In the opinion on reversal, the Appellate Court cited *Olson v. Northern Pacific Lumber Co.*, 106 Fed. 268; *Guedon v. Rooney*, 87 Pac. (2d) 209, and *Pittsburgh Railway Company v. Thomas*, 174 Pac. 591, as being authority for the proposition, "that a record of a single incident and the significance even of that, is seriously in dispute", was not sufficient to charge the master with knowledge. The proof at present takes the case entirely out of the rule laid down in the cases cited and *Guedon v. Rooney* becomes the strongest authority for appellees. In addition, the Court in *Olson v. Northern Pacific Lumber Co.*, had in mind minor incidents and this is shown conclusively by the Court's statement on page 308, to this effect:

"To have discharged him on such grounds would not have been the act of a reasonable employer, but it would have been an unreasonable act, without common sense and justice."

Now, would it have been an unreasonable act to discharge Hair after killing Meyers when he was drunk? Apparently Mr. Roe did not think so, for he asked Darr in his telegram, for permission to keep employing him until they knew the outcome of the manslaughter charge.

Since the decision of this case on the first appeal, this Court has held in *Mareas v. Fred Harvey*, that the knowledge of the owner concerning the habits of a mule, was sufficient to charge the owner with notice of what the mule might do the next year. In view of the holding in this case, it does not seem that it is illogical or unreasonable to hold that a master is bound to take notice that the servant may again so act, in drinking and hauling guests, especially where the servant has a reputation for being a drunken, reckless driver, and where as here, the master has direct and positive information that its servant, while violating instructions, has become drunk and killed a person, and when it has direct notice that the servant has been convicted of manslaughter for the particular offense and that the information or criminal complaint charged that the killing occurred while the servant was intoxicated.

The record of Hair's conviction was competent upon several grounds, namely to show Hair's conviction of a felony; to show a knowledge of Donnelly in rebuttal of Donnelly's claim that Hair was not drunk, reckless or negligent at the time and as proof of the fact that he was a drunken driver and that the incident was brought home to the appellant.

Under all of these facts and circumstances, the evidence was ample to take the case to the jury upon this theory.

VII.

It is claimed at length that the testimony as to reputation offered, was not competent or admissible. The testimony of Close, Pugmire, Buskirk and Williams was addressed to the discretion of the Court; the proper foundation was laid as to the general reputation in the community and the authorities cited in our summary amply sustain the recit of this testimony.

An attempt is made to contend that peace officers cannot testify and that business men should be called. A perusal of the cases that have to do with a reputation for drunken driving or recklessness, show that in almost every instance, the testimony given is that of officers. Who would be more likely to know, and whose duty is it to observe these things?

The testimony of the witness Williams as to the reputation of Avenell Newby was of the highest class. If one has never heard anything derogatory said of an individual, certainly that individual has a good reputation. (*Hinson v. State*, 52 So. 194.)

VIII-IX-X.

The appellant consented that a general verdict might be submitted and made no objection to the form of the same. They did not make any request for a separate finding as to whether Hair was on company business;

whether appellant knew of his reputation; whether he actually was a careless, drunken, reckless and incompetent driver, or whether the company had notice; or whether they found for the plaintiff on both theories. It is too late on appeal to first object and contend that the evidence must support both theories. If the jury was justified in finding for the plaintiff on either theory, the verdict is sufficient.

And we call particular attention to the fact that appellant did not request any instruction that the jury was required to find for the appellees on both theories before they could return a verdict and they did not except to the Court instructing the jury, that appellees were entitled to recover on either theory. Their only exception was that there was no evidence to go to the jury on the question of the reputation of Hair and they specifically asked instructions on this phase of the case.

We are sure it is readily recognized by Courts and lawyers alike, that every side issue that enters into a case and that every objection raised cannot be argued to a final conclusion. A book could be written upon any single question raised in a case. All that Courts and lawyers can do is to see to it that a general and fair presentation of the case be made and that the main questions be properly presented to a jury so that they may intelligently pass upon it.

As appellees view this case, there are only two questions before the Court that were not previously decided. First: was the evidence sufficient to go to the jury on the question of Hair's being a careless, reck-

less, drunken and incompetent driver, and this has been discussed. Second: does the fact that the cause was reversed when Hair did not appeal, fix the ceiling on the amount that can be recovered against the appellant? That question was not in the case before and must now be decided.

XI-XII-XIII-XIV.

The case was originally filed in the State Court of Idaho. That Hair was a bona fide resident of the State of Idaho, cannot be questioned. He gave his address as his home in Pocatello when he made his reports to the company at the time of Mrs. Newby's injury. He lived in Pocatello continuously. However, counsel then acting for the appellees, permitted the case to be removed to the Federal Court. There can be no question if this cause were now in the Idaho Courts, what the holding would be. It is immaterial what the Courts of North Carolina hold, nor does it make any difference what the weight of authority is. The appellant put its agent in Idaho; had him operate their motor vehicle on its roads. They were bound by the decision in *Judd v. O. S. L. R.R. Co.*, supra, and by the other Idaho cases. To attempt to argue this matter is to take up a discussion of *Erie R.R. Co. v. Tompkins*, which would be of no advantage to the Appellate Court. What more can be said on this matter than was said by Justice Charles E. Clark in the citation heretofore given, when he said:

“Throughout a given territory, one law ought to prevail; and it is a blot on the idea of justice if two courts operating in the same territory apply

different rules for litigants similarly situated, but allocated by chance to different courts.”

It is contended that the case, *Department of Water and Power v. Anderson*, 95 Fed. (2d) 577, is authority for the proposition that the Ninth Circuit is committed to the rule that it will review a refusal to grant a new trial if the verdict is grossly excessive. Appellees submit that this case is not authority to review the action of the trial Court because the verdict in the instant case is not grossly excessive.

Regardless of that matter the opinion in this case was written March 28, 1938, prior to the time the present rules of Civil Procedure took effect and the opinion had to do with an action commenced a considerable time prior thereto.

We call attention to the analysis of the rules of Civil Procedure by the Honorable William D. Mitchell, who in discussing Rule 59, having to do with new trials, said:

“Of course, in the Federal courts, a motion for a new trial is unavailing unless completed. There is no appeal from the order granting or denying.”

Appellees are not going to be drawn into further argument on the question of the failure of the Court to grant a new trial. Surely that matter is as well settled under the present rules as are the matters decided in *Erie R.R. Co. v. Tompkins*.

Appellees do not waive any of the points made in the summary by failing to argue them, but everything cannot be argued. The Court of Appeals undoubtedly

realized this when they limited briefs to a certain number of pages.

XV-XVI.

APPELLANT'S POSITION AND SPECIFICATION OF ERRORS.

Appellant at the trial complained bitterly because counsel for appellees introduced the cross-examination of Darr and called Donnelly for cross-examination, and are still arguing and complaining on that ground, and have made nineteen specifications of error concerning this matter. Specifications III to XXI inclusive, pages 11 to 17 of appellant's brief. They contend that it was prejudicial to permit Darr's cross-examination before his direct examination. The appellant took his deposition, testimony that helped make the appellees' case and was important, was brought out on cross-examination. What was proper and how was counsel for appellees to get this testimony in the record? What assurance did he have that the appellant would introduce this deposition in evidence? What would have been his standing if he had rested and then complained that the appellant did not put the deposition in evidence? How could he have complained if he had not cross-examined Donnelly and Donnelly had not been placed upon the stand? We simply cannot understand this objection and the time devoted to it in view of subdivision (d) of Rule 26 of the Rules of Civil Procedure; so much thereof as is applicable being quoted:

“(d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as

admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

“(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.”

The objection to the cross-examination of Donnelly is without any force whatever. Rule 43, subdivision (b), Rules of Civil Procedure:

“(b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.”

An attempt is made to complain that the verdict is excessive. The appellant requested instructions on the measure of damages and the elements that could be considered and took no exception whatever to the instructions of the Court on this phase of the case.

The appellant complains in its argument, of the Court instructing the jury (Appellant's Brief, bottom of page 69) :

“The court elsewhere in its instructions advised the jury that all items touching the Meyers incident dealt merely with the question of a waiver of instructions against hauling guests. There was no reason for this instruction when the injunction against hauling guests had commenced anew after the Meyers incident.”

The appellant cannot object to an instruction that is most favorable to it, and it is an unusual argument to contend that, after each violation of instructions, the master and servant can commence anew and that the prior violations may be forgotten and do not count.

The question of instructions as to the guest statute and as to the statutory provisions of Idaho concerning operation of a motor vehicle upon a highway, were definitely disposed of by this Court on the former appeal.

The trial Court was entitled to instruct the jury with the identical and precise instructions that were given in the former trial, if the evidence was sufficient to go to the jury on the question of the master's knowledge of Hair's activity. However, in addition the Court more fully instructed the jury and gave the instruction referred to in the concurring opinion of Justice Denman, as to the presumption that the driver of the automobile is the owner's agent, being rebuttable.

The record discloses that the trial Court tried diligently to follow the decision of the Court on appeal.

The matter is minor, but on page eleven under specification No. 11 of appellant's brief, it is indicated that the complaint was amended by counsel for appellees, by substituting the word "drunken" for incompetent. The record cited might give some color to that statement. However, the amendment as shown in the clerk's minutes shows that the word "drunken" was added, but not that the word "incompetent" was dropped and the Court's instructions clearly indicate that the complaint as amended was to the effect that Hair was a careless, reckless, drunken and incompetent driver. On page 22, specification of error XXXI of appellant's brief, it is stated that the amended complaint charged that appellant knew Hair,

"to be a careless, reckless, drunken and incompetent driver."

It does not seem to be necessary to argue that it was not error to ^{refuse to} give a directed verdict under the present record, if it was not error to refuse to do so on the first trial.

We have heretofore mentioned the fact that appellant's requested instructions are not in the record. Appellant requested the instruction found under their specification of error on page 27 and the same was given. The same is true in general as to the exceptions to the instructions given.

The question of contributory negligence is not in the case and was definitely disposed of by the decision heretofore given.

On page 39 of appellant's brief, this statement is found:

"There isn't a scintilla of evidence in the record showing that the appellant ever knew of Hair's hauling of a guest after the Meyers incident."

This statement overlooked Donnelly's statement to Hair in the presence of Newby and the Teuscher boys.

At page 74 of appellant's brief, it is said:

"While this unfortunate adventure naturally provokes a sympathetic forgiveness yet it cannot help but reflect upon her value to her husband and children."

The appellant was not this subtle when the matter was presented to the jury. The record shows that they endeavored through the witness Perkins to attack the character of Avenell Newby, they put in every word of testimony on this phase of the matter that they desired. They endeavored to blacken her character by the testimony of Hair and Rasmussen. They did not, however, request any instruction whatever on this matter. It was perfectly apparent at the trial and is now, that where Hair and Mrs. Newby were the night before the accident could have nothing to do with whether Hair was on company business. It was perfectly apparent that regardless of any notice that Jack Perkins may or may not have given Mr. and Mrs. Newby to vacate the apartment, it could not have the faintest effect upon the issues in the case. This evidence was elicited and attempted to be brought out for the purpose of damaging Mrs. Newby. If the appellant failed in its purpose it can hardly ask the

Appellate Court to reverse this case because their testimony was not considered by the jury as they hoped it would be.

This case has been tried twice, resulting in a verdict for the appellees both times. If there ever was a case in which the rule that the Court and jury who see and observe the witnesses, are in better position to determine matters of fact than the Appellate Court, the rule is exemplified in this case.

The appellant was given an absolutely fair trial; its counsel had their own way in the matter of instructions as to the Meyers incident and as to the proof they desired to offer. The Court only refused to consider their contention that the jury could not return a verdict in a greater amount than \$7500.00.

Every suggestion made by the Circuit Court of Appeals in its original opinion was adhered to by the trial judge. He could not fairly do other than present to the jury the questions as he presented them in view of the additional proof as to Hair's known intoxication when driving the company truck and the proof of his reputation by reputable witnesses.

It is respectfully submitted that the case must be affirmed.

Dated, Pocatello, Idaho,
December 26, 1945.

GLENN A. COUGHLAN,

B. W. DAVIS,

Attorneys for Appellees.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

R. J. REYNOLDS TOBACCO COMPANY,

Appellant

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,
both minors, by their Guardian ad litem, George H. Newby,
Appellees

Reply Brief of Appellants

On Appeal from the District Court of the United States for the
District of Idaho, Eastern Division

E. B. SMITH

Residence: Boise, Idaho

A. L. MERRILL

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Residence: Pocatello, Idaho

Attorneys for Appellant

FILED

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PAUL P. O'BRIEN,
CLERK

No. 11137

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Appellees

Reply Brief of Appellants

STATEMENT

Appellant presents this reply brief particularly for the purpose of pointing out wherein it is thought appellees have failed to properly interpret some of the fundamental points involved in this case and to answer the same and have failed to consider certain fundamental errors relied upon by the appellant. Appellant asserts that appellees misinterpret certain factual situations and the legal effect of certain evidence and the allegations of their complaint as amended at the time of the second trial. Furthermore, it is suggested that many of the authorities cited by appellees are not in point and others do not support the statements for which they are cited. Space does not permit an analysis of all of the cases but a few of them will be considered.

ARGUMENT

I.

APPELLEES' STATEMENT EXAMINED

Appellees commence their brief with what they call a "statement of facts." Issue is taken with their interpretation of the evidence upon which they seek to rely to support the judgment. It is to be observed that only a small portion of this statement is devoted to the fundamental theory of the case of supporting a judgment against appellant by reason of the conduct of Hair at the time of the Newby accident, and approximately three-fourths of this statement either deals entirely with, or alludes to, the so-called Myers incident. As pointed out in appellant's original brief (p. 36), more time is devoted to the Myers incident than to the accident for which appellant was sued.

On page 2 of their brief the appellees say:

"Appellees submit that the record fairly shows evidence sufficient to go to the jury on the following facts: That Hair was drinking and undoubtedly proceeding as a drunken, reckless driver at the time of the unfortunate accident; that he had hauled guests to the knowledge of the company repeatedly; that he was in the course of company business, being in his own territory, calling on his dealers; advertising his products during business hours; making written report that he was on company business and generally conducting himself as he had been in the habit of conducting himself, while in the exclusive control of the car in the past."

We wish to examine this statement. It is to be observed that Hair was not charged with drinking or with drunkenness or

intoxication when this accident occurred (R. 18-22). The idea of drunkenness was injected into the suit by an amendment of the complaint during the second trial, when the court permitted appellees to amend paragraph VII of the amended complaint by inserting the word "drunken" for the word "incompetent" (R. 316-317). It is to be definitely observed that paragraph VIII of the amended complaint (R. 21) charges that Hair, "with reckless disregard of the rights * * * of Avenell Newby," drove the car in such a manner as to cause the injury. There is no charge of drunkenness nor that Hair was drinking or was drunken at the time of the accident or that it was caused by intoxication. There is no substantial evidence that Hair "undoubtedly" proceeded as a drunken driver. We shall refer to this however a little later.

The statement that Hair "had hauled guests to the knowledge of the company repeatedly" is definitely not supported by the evidence. The Myers incident is the only one where it could be maintained that the company knew that Hair hauled a guest, or had been drinking, and that incident should not, and can not, have any bearing in this case, because it is an isolated instance, happening three and one-half years prior to the Newby accident, and, further, because after that occurrence Hair and the agents of the company had a definite understanding, which is undisputed, to the effect that hauling of guests would never again occur (R. 295, 303, 304, 382). Hair having started out anew, that incident necessarily must be eliminated from the cause.

The statement that Hair was in the course of comparing business, "being in his own territory *calling on his dealers*,"

is misleading and certainly not supported by any evidence whatever. While the accident happened in the territory in which Hair usually worked, yet there is not a scintilla of evidence that Hair called on any dealer from the time he picked up Avenell Newby until after the accident. On pages 30 and 31 of appellees' brief certain testimony is quoted which, we presume, they mean to support their assertion that Hair was "calling on his dealers." There isn't a word in this testimony to the effect that he was calling on dealers during the time he was partying with Avenell Newby. Every question asked and every question answered had to do with his business under ordinary conditions and not under these conditions. If it be urged that these questions and answers created a presumption that he was carrying on business in the ordinary way, then this presumption was completely and wholly destroyed by Hair's definite testimony that during all of this period of time he did not do any business of any kind or character for the company, but was devoting his entire time to Avenell Newby (R. 398, 411-412). On page 33 appellees attempt to chide the appellant for not calling Dr. Hughart as a rebuttal witness touching the Myers incident. We, of course, were not trying the Myers case. While this suggestion by the appellees is improper (See *Wright v. Safeway Store*, Wash. 109 P. 2 542, Syllabus No. 4), yet appellees, having invoked it, we ask: "Why, if Hair was transacting any business during this time, did not appellees call some dealer to so testify?" The answer is plain. There was no such dealer.

It is asserted that Hair was advertising products "during business hours." There is no more evidence that he was adver-

tising products during business hours than that he was advertising products in the night-time and while his car was parked in front of the Enders Hotel where he and Avenell Newby were spending the early hours of the morning of the day of the accident. The only possible evidence that appellees urge that he was advertising products of the company during that time is the fact that appellant's sign was printed on the car. Such has been definitely held to be wholly insufficient to support the theory that he was thus engaged in his master's business when the evidence shows he was on a party of his own. See *White v. Firestone Tire & Rubber Co.*, 90 F. 2d 637. The appellees cite no case to the contrary. Neither does the fact that products manufactured by the appellant were in the car prove or attempt to prove that Hair was on company business. See *Allen v. Ross* (Ark.), 138 S. W. 2d 409.

The fact that Hair made a written report to the company on the evening of the accident can not be considered evidence, in view of his testimony that such report was untrue and was made to his company for the purpose of deceit (R. 411-412). The statement that Hair was "generally conducting himself as he had been in the habit of conducting himself" when the accident occurred is likewise without proof. There is no evidence whatever that Hair conducted business of the company in the manner in which he acted from the time he picked up Avenell Newby until the time of the accident. On the contrary the evidence is, from the time of the so-called Myers incident until the Newby accident, his record was without blemish (R. 260-262, 414, 480-2). We most respectfully suggest therefore that the court consider the quoted paragraph

of appellee's "Statement of Facts" in light of the evidence presented. Every presumption has been definitely overcome and such cases as *Willi v. Schaefer-Hitchcock*, 53 Ida. 367, 25 P. 2d 167; *Magee v. Hargrove Motor Co.*, 50 Ida. 442, 296 P. 774, *Baldwin v. Singer Sewing Machine Co.*, 49 Ida. 231, 287 P. 944, and *Joslyn v. Idaho Times Co.*, 56 Ida. 242, 53 P. 323, should certainly require a conclusion to this effect.

Appellees then continue with their "Statement of Facts" by stressing the Myers incident, which occurred three and one-half years before the Newby accident. This court in *Reynolds Tobacco Co. v. Newby*, 145 F. 2d 768, specifically ruled that the Myers incident could not be used nor relied upon, it being an isolated incident, for the purpose of proving Hair's incompetency as a driver of an automobile. No other incident was attempted to be proved. Appellees now seek by subtle artifice to connect up the Myers incident as competent proof on the theory that Hair's general reputation as a drunken reckless driver during the years 1939, 1940, and 1941, was proven, as they contend, by the witnesses Pugmire, Close, and Buskirk. Appellant has pointed out in its original brief the utter failure of this proof and the error of the court in receiving it and in refusing to strike it.

In further reliance on the Myers incident appellees urge that appellant's representatives suggested that Hair be continued in appellant's employ until the outcome of the manslaughter charge growing out of the Myers incident, although realizing that upon any such conviction involving drunken driving Hair's license would be revoked. Appellant asserts that such attempt on the part of appellees to urge the applica-

bility of such asserted proof might well be likened to pyramiding presumptions upon presumptions. They are presuming that the original Myers incident may now be accepted as proof and if so something else dependent thereon might likewise be considered. The Myers incident itself, having been excluded by this court as having any semblance of probitive value, then the later incidents relating to it would likewise have no probitive value nor any bearing whatsoever upon the issues.

Appellees assert, at page 29 of their brief, in support of their point No. 2 that "Hair was drunk," and driving as a drunken driver. Hair was never charged in the complaint with driving while intoxicated. While appellant asserts that the record does not show that Hair was intoxicated at the time of the accident, nevertheless, the theory is clearly applicable that, since the record shows Hair had partaken of intoxicants during the party of some eighteen hours which he and Mrs. Newby had together prior to the accident, and since the record likewise shows that Mrs. Newby partook of intoxicants too along with him, any evidence which may infer elements of intoxication or reckless disregard on the part of Hair at the time of the accident likewise is applicable to Mrs. Newby. Further, appellees' amendment to their complaint to include the allegations that Hair was a drunken driver brings the case within the rule of *French v. Tebben*, 53 Ida. 701; 27 P. 2d 475, of contributory negligence and assumption of risk. Mrs. Newby, by her own solicitation of the party, her subsequent acts and conduct with Hair, and her riding in the automobile as Hair's guest, clearly shows her assumption of all of the risks

thereof, and likewise these acts render her contributorily negligent, all under the rules of *French v. Tebben*.

On retrial appellees simply enlarged upon the Myers incident, spending more time on this matter than upon the case at bar, and notwithstanding the fact that the appellate court had ruled it insufficient to show incompetence of Hair. They seemed to think that it was the size of the incident rather than the incident itself and, without proof of any other act of misconduct, now try to support it with discredited statements of two police officers as to their opinion, when, if other incidents existed, the jury was in as good position as they to determine such fact. The case, therefore, can no more resist a reversal than it did before.

II.

DERIVATIVE LIABILITY OR SEPERATE VERDICTS

The appellant earnestly contends that in no event could its maximum liability exceed the amount of the judgment heretofore rendered against Rulon D. Hair. This mater is covered by appellant's assignments of error and the argument on pages 61-69 of its original brief. This is so because such damages, if any, which occurred to the appellees was the direct result of the conduct of Rulon D. Hair, and if there is any liability whatever on the part of the appellant it is a derivative liability. On page 25 of the appellees' brief it is said: "Counsel for appellees is not fully convinced or satisfied under the authorities that the case was not reversed as to Hair." The authorities cited by appellees in an effort to sustain such lack of conviction certainly do not support it. We invite them to

the Court's attention. The original judgment was against Hair, Donnelly, and this appellant. Donnelly and this appellant appealed. Hair did not appeal. The judgment was reversed as to appellants, and this was the theory upon which the court tried the case the second time (R. 112-113). The judgment, of course, became final as to Hair and its amount is the maximum liability that could possibly be asserted against an employer. If, however, there is no judgment against Hair, as suggested by appellees, then there can be no judgment in any amount against the employer. A failure of the trial court to recognize this principle of law demands a reversal of this case. On pages 22 and 24 of appellees' brief a number of authorities are cited in an effort to sustain the theory that in Idaho, where master and servant are defendants, separate verdicts may be returned in different amounts. The theory of derivative liability has been entirely overlooked and it is not argued in appellees' brief except to contend that the law of Idaho is contrary to this theory. This we believe is not so. We wish to analyze briefly the authorities on page 22 of appellees' brief which they urge sustains their theory.

The first case cited is *Browder v. Cook & Quane*, 59 F. Sup. 675. This is a decision rendered by Judge Clark in the District Court of Idaho. The question of derivative liability is not at all involved. As a matter of fact there is nothing in the case from which one could conclude that a master and servant relationship existed. It is upon the theory that joint tortfeasors have been sued and verdicts in different amounts rendered. It is always to be remembered in the case at bar that the damage, if any, to the appellees was caused by Hair. There

was no independent act of any kind or character on the part of appellant upon which a verdict could be sustained against it. Appellees attempt to argue that appellant was negligent in employing Hair. This we contend is entirely unsupported by the evidence and the numerous errors recited in appellant's original brief, and the arguments based thereon support this theory. But if, for the sake of argument, and argument only, both theories involved in this case be considered, still the damage to the appellees, if any, was caused by Hair and not by any independent act of appellant, and appellant's liability, if any, is purely derivative.

The case of *Judd v. O. S. L. Ry. Co. and Strickfaden v. Greencreek Highway Dist.* have each been discussed in appellant's brief on pages 67-69. Again it is pointed out that the question of derivative liability was not considered in either of these cases. Furthermore, as appears in the *Judd* case, in 4 F. Sup. 675, liability of the railroad company was also urged for negligently failing to supply and maintain traffic signals and to clear approaches to its right-of-way, over which the engineer had absolutely no control, and with which he had nothing to do.

The next case is *Wallace v. Hartford*, 31 Ida. 481. Again, we submit this case is completely foreign to the point under consideration. It merely holds that the negligence of an agent to issue a policy of insurance rendered both the insurance company and the agent liable.

The case of *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, 50 L. Ed. 441, is likewise unrelated to

the doctrine of derivative liability. This entire case is reflected in the syllabus in the following language:

"A case in which plaintiff in good faith has elected to sue jointly in tort a foreign corporation and its servant whose misconduct caused the injury complained of, does not—even though such joinder may be improper — present a separable controversy between plaintiff and corporation which under the act * * * can be removed from a state to a Federal Circuit Court without regard to citizenship of individual defendants."

The next case is *Gale v. Independent Taxi Owners Assn.*, 84 F. 2d 249. Here again the question of derivative liability is not discussed, but defendants were charged as having been engaged in a joint enterprise. There is then cited 8 Cyc. 804 and 23 Cyc. 1470. Probably no citations could be farther from the point involved than these two and it is difficult to understand why they appear. The first deals with constitutional law and presumptions as to the constitutionality of legislative enactments. The second citation deals with payment of joint judgments and the assignment of the judgment and the respective rights of the parties under such circumstances.

In the case of *Hooks v. Vet.*, 192 F. 314, again the question of derivative liability is not discussed. Here there were a number of defendants sued for assault and battery and seemingly engaged in a joint tort. The case of *Ohio Valley Bank v. Greenbaum et al.*, 11 F. 2d 87, is an action for deceit wherein the corporation and an individual were sued as joint tortfeasors and for acts committed by each.

Appellees then cite two cases from Kentucky, one case from the State of Washington, and then again cite a Kentucky case. We wish to consider the Washington case first. It is *Custis v. Puget Sound Bridge Co.*, 233 P. 936. Appellees contend that this case held that a complete exoneration of the servant would not effect the master, even though the facts showed the master was negligent. But it is to be noticed that this case is upon the theory that there was independent negligence on the part of the master. This is reflected in syllabus No. 2 as follows:

“In joint action against master and servant for damages for tort committed by servant, where there is evidence of master’s negligence *independent of any negligence of the servant*, verdict for servant does not release master.” (Italics ours.)

On page 938 the court says:

“The first of the reasons suggested (why the release of the servant should release the master) is that the release of Case by the jury is, in law, a release of the appellant and that therefore the motion for judgment notwithstanding the verdict should be granted. In *Doremus v. Root*, 23 Wash. 710, 63 P. 572; 54 L. R. A. 649, the rule was announced, which has been followed in some thirteen or fourteen cases since, that a judgment in favor of the servant in an action to recover damages for a tort committed by the servant is a bar to an action against the master to recover damages for the same tort of the servant, and where the servant and the master have been joined in actions of this nature a dismissal of the servant dismisses the master. With this rule of law there can be no quarrel and were the record undisputably such as would justify the court or a jury in saying that the acts which are relied on as a basis of the respondent’s cause of action were

acts committed by Case as a servant or employee of the appellant, the argument of the appellant would be conclusive."

The court then discusses independent tortuous acts of the employer, over which the servant had no control, and upon this basis makes its ruling. It is therefore to be observed that this case not only is not helpful to appellees but decidedly hurtful.

The Kentucky cases cited in appellees' brief and above referred to seemingly are contrary to the theory of derivative liability. But, consider them for a moment. The case of *J. I. Case et al. v. Haines*, 199 S. W. 786, was decided before the case of *Myers' Admx. v. Brown*, 61 S. W. 2d 1052. In the *Myers* case the question of derivative liability was before the court and the court in its opinion, on pages 1053 and 1054, quotes at length from *Freeman on Judgments*, sec. 469, part of which quotation appears in appellant's original brief on pages 62 and 63. After considering the text from *Freeman*, the Kentucky court recognizes its value and worth but concludes that it has in other cases, including the *Haines* case, held against the theory of derivative liability and should do so in this case. The matter, however, again came before the Kentucky court in a later case not cited by appellees. In the case of *Illinois Central Railroad Co. v. Applegate's Admx. (Ky.)*, 105 S. W. 2d 153, while the court felt bound for other reasons to affirm a verdict against the railroad company when the agent had been exonerated, nevertheless, very clearly discourages and overrules this entire doctrine. Syllabus No. 17 is as follows:

"Master's liability for tort committed by servant rests upon doctrine of *respondeat superior* and unless

negligence on the part of the servant is shown a recovery against the master cannot be had."

On page 159 the court analyzes the Kentucky cases on this point and then says:

"The rule was based on the theory that the master and servant were joint tortfeasors. The theory, of course, was erroneous. The master's rights rest upon the doctrine of respondeat superior, and unless negligence on the part of the servant is shown, a recovery against the master cannot be had."

After attempting to justify some of its decisions on other grounds, the court continues:

"In other jurisdictions where the question has been considered, it is held that a verdict against the master, after finding in favor of the servant in an action brought against the master and servant for damages caused solely by the negligence of the servant, is inconsistent and illogical and should not be permitted to stand."

The court then cites a large number of cases sustaining this statement.

The case just considered undoubtedly means that by overruling its previous decisions on this point the Kentucky court is now in accord with "other jurisdictions where the question has been considered," and the theory of derivative liability now presents, we believe, a uniform rule of law throughout the United States. Again we invite attention to the case of *Pinnex v. Griffin*, 221 N. C. 348, 20 S. E. 2d 336, which so clearly argues this point. We further suggest that to hold otherwise would impinge upon the constitutional rights of equal

protection of law. This is aptly suggested in *All vs. Delaware & H. R. Corp.*, 29 N. Y. S. 2d 439, on page 441 as follows:

“To permit a plaintiff to have damage in a greater amount against a master for the act of the servant than was allowed against the servant for the same act and for the same result would be an incongruity, if, indeed, it afforded the master, in respect to ad-measuring damages, the equal protection of the laws of the state within the intent of the constitution, Art. 1, Sec. 11.”

See Art. I, Sec. 13, Idaho Constitution.

III.

TESTIMONY AS TO REPUTATION

On pages 15, 16, and 17, of appellees' brief it is urged that it was within the discretion of the trial court to determine whether an expert or character witness has sufficiently qualified to permit evidence of opinion. A number of cases are cited which appellees seemingly contend support this theory. But appellant contends that under the facts in this case there existed no right to present such testimony and it was error to admit it. See original brief pages 41-45. Hence appellees' argument misses the point. Appellees also entirely disregard the further position of appellant. Here the qualifying testimony was entirely destroyed on cross-examination and said witnesses admitted they had no information upon which to base their conclusions. Appellant then moved to strike this testimony. This motion should have been granted for the reasons argued in the original brief, pages 40-43. Appellees do not attempt to answer this argument and we submit it cannot be answered. To permit the testimony to remain was highly prejudicial.

IV.

TWO THEORIES IN THE COMPLAINT

Appellees argue on pages 38 and 39 of their brief that even though two theories were submitted to the jury, yet if the verdict could be sustained on either theory they were entitled to recover. We take direct issue with appellees on this point. The submission of the case on both theories to the jury has been attacked by the appellant in numerous ways, particularly in the introduction of the evidence, motions to strike, objections to instructions to the jury, and refusal to give other instructions. If, as we contend, the court erred in these various particulars, obviously the verdict can not be supported, but furthermore it is the general rule that a general verdict must be reversed in a case where it could not be sustained on one of two or more grounds upon which the case was submitted.

In *Southern Casualty Co. v. Hughes* (Ariz.) 263 P. 584, the decision of the court is clearly stated in syllabus 14 as follows:

“Where verdict for plaintiff could have been sustained on one of the two grounds on which it was submitted to jury but not on the second ground, general verdict for plaintiff must be reversed on appeal, since appellate court had no means of knowing on which ground verdict rested.”

In *Goldberg v. Globe & Republic Ins. Co. of America* (Minn.) 259 N. W. 402, on page 403 it is said:

“It is settled that where there are two or more material issues tried and submitted to the jury and the verdict is a general one, it cannot be upheld if there

was error in instructing the jury as to any one of the two or more issues. * * * and we have no means of ascertaining, on which issue the jury returned the verdict."

In *Christian v. Boston & M. R. R.* (6 Cir.) 109 F. 2d 103, on page 105 the Court said:

"Where two issues of negligence are sent to the jury and the verdict for the plaintiff is general, the judgment must be reversed if there was no evidence in support of one of the issues. *Wilmington Star Mining Co. v. Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed 708; *New York N. H. & H. R. Co. v. Murphy*, 2 Cir., 204 F. 420; *Eric R. Co. v. Gallagher*, 2 Cir., 255 F. 814."

In *Wilmington Star Mining Co. v. Fulton*, 205 U. S. 60, 27 S. Ct. 412, 51 L. Ed 708, the opinion of the court is stated in the syllabus as follows:

"Permitting the jury, over objection raised by a motion to strike, to take into consideration, in reaching the verdict, counts in a declaration which had not been supported by any evidence, is prejudicial error, where it is impossible for the record to say upon which counts of the declaration the verdict was based."

Rule 49 (b) of the Rules of Federal Procedure does not affect this theory. The submission of such interrogatories to a jury are permissive and not mandatory and does not change the general theory of law on this point. *Marcus Loew Book-ing Agency v. Princess Pat*, 141 F. 2d 152 (7 Cir.). If appellees wanted to have avoided this danger they should have invoked this rule. They are the litigants who presented the double theory.

V.

USE OF DEPOSITIONS

At the trial of the cause, over the objections of the appellant, the appellees were permitted to use certain depositions elicited on cross-examination of the witness Darr before the deposition had been placed in evidence. Appellees argue on pages 42 and 43 of their brief that they had a right to do this under Federal Rules 26 (d) and 43 (b). We submit that the entire point of appellant's objections is overlooked. The use of these depositions over the objection of the appellant was an effort to disprove anticipated defenses for example a waiver of appellant's instruction to Hair not to haul guests before this waiver had been asserted. This instruction was only one point in the case. It could not become material to the appellees until and unless the appellant asserted it. The rules referred to certainly do not authorize trying a case backward and neither do they authorize the use of depositions when, at least at that stage of the case, the same are wholly immaterial.

VI.

REQUESTED INSTRUCTIONS

On page 25 of appellees' brief complaint seems to be made that appellant specifies as error the giving of certain instructions on the theory alleged that Hair was a careless and reckless driver and appellees say they had no way of knowing from the statement of points relied upon what error would be specified. This argument is wholly without merit. The appellant took exceptions in open court to every instruction of which it now complains and stated in the presence of counsel

for appellees the grounds of such exception (R. 507-517). In the Statement of Points appellant asserts:

“There should not have been given to the jury those certain instructions to which objection was made by appellant at the time said instructions were given, and there should have been given to the jury those requested instructions presented by appellant and refused by the trial court (R. 529).”

It cannot be argued that the foregoing did not fully acquaint appellees with appellant's intention with reference to this instruction. The record requested was all the rules required (R. 521-525 and particularly No. 29 on page 524).

Furthermore the objection to the particular instructions referred to was not to the wording but to the giving of any instruction on that particular subject matter.

VII.

NEW TRIAL

Appellant assigned as error the refusal of the trial court to grant its motion for a new trial and urges this error because of abuse of discretion on the part of the trial court for the reasons asserted in the opening brief, including excessive damages. Appellees in an attempt to answer this argument, on page 41 of their brief, assert that the case of *Dept. of Water & Power v. Anderson*, 95 F. 2d 577, relied upon by appellant is outmoded by the adoption of the Rules of Federal Procedure, and quotes one William D. Mitchell to the effect that there is now no appeal from an order denying a new trial. This is not a correct statement of the law. The federal courts

still have the power to consider and act upon the motion for a new trial where the trial court has abused its discretion in denying such a motion. The following cases have been decided since the adoption of the Federal Rules and, while a new trial was not granted in these cases, yet the language of the court in each instance clearly recognizes that the power still exists in the appellate court to consider this point. See *King v. Leach*, 131 F. 2d 8, decided Nov. 3, 1942, and *Dyess v. W. W. Clyde & Co.*, 132 F. 2d 972, decided Dec. 16, 1942.

It is therefore respectfully submitted that this case should be reversed and appellant recover its costs.

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